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No. 01-011324

IN THE

# Supreme Court of the United States

The Metropolitan Government of Nashville and Davidson County and Emmett Turner, Chief of Police of the Metropolitan Police Department,
*Petitioners*,

v.

Deja Vu of Nashville, Inc., *et al.*,
*Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

This Petition involves a challenge by respondents to the judicial review provisions of Chapter 6.54 of the Metropolitan Code of Nashville and Davidson County ("the Ordinance"), which governs the licensing of adult businesses and entertainers. The Ordinance guarantees respondents "prompt access to judicial review" by permitting them to take an immediate appeal from any adverse administrative decision and furthermore providing that the administrative decision is not effective unless and until sustained by the reviewing court "on the merits." The Ordinance does not guarantee respondents a "prompt judicial determination" in the sense that it does not require the court to hear their appeal by a date certain. The Ordinance does provide respondents with other procedural protections, however, by (a) automatically issuing an interim license or permit if the court does not decide the appeal within forty days, and (b) staying the administrative decision until the appeal is concluded.

The Questions Presented are:

1. Does Chapter 6.54 satisfy the First Amendment because it sufficiently guarantees "prompt access to judicial review," notwithstanding that it does not guarantee a "prompt judicial determination" on the merits?

2. Assuming that the answer to question one is "no," is Chapter 6.54 nonetheless constitutional because of the additional procedural protections it provides?

## PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following persons and entities were parties to the proceedings below and are respondents in this Court: Meroney Entertainment, Inc., d/b/a Ken's Gold Club; The Pleasure Palace, Inc.; The 822 Corporation; 421 Corporation; Carousel Amusement Center, Inc.; Michael Rucker; Michael Butler; Dawn Pierce; Elizabeth Martz; and Jerry C. Pendergrass.

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## PETITION FOR A WRIT OF CERTIORARI

The Metropolitan Government of Nashville and Davidson County and Emmett Turner, Chief of Police of the Metropolitan Police Department (collectively, "petitioner") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.[1]

## OPINIONS BELOW

The Sixth Circuit's opinion (per Martin, C.J., with Suhrheinrich, J.; Wellford, J., concurring in part and dissenting in part) (Pet. App. 1a-41a) is published at 274 F.3d 377. The Sixth Circuit's order denying rehearing and rehearing *en banc* (Pet. App. 42a) is unpublished. The district court's opinions and orders (*id.* 43a-128a) are unpublished.

## RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The appendix (at 129a-176a) reproduces the First Amendment to the United States Constitution, Tenn. Code Ann. § 27-9-111, and the version of Chapter 6.54 of the Metropolitan Code of Nashville and Davidson County applicable to this case.

## JURISDICTION

The Sixth Circuit denied petitioner's timely petition for rehearing with a suggestion of rehearing *en banc* on February 5, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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[1] Because Chief Turner is a party only in his capacity as an official of the Metropolitan Government, this Petition uses the collective "petitioner."

## STATEMENT

It's like *déjà vu* all over again.

This Court has twice recently granted certiorari to resolve the substantial circuit conflict over the principal question presented by this Petition: whether, under *FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215 (1990), and *Freedman* v. *Maryland*, 380 U.S. 51 (1965), the First Amendment mandates that adult businesses receive a "prompt judicial determination" on appeal from the denial of a license to operate or whether it instead requires only that businesses receive "prompt access" to judicial review. But, in both cases, the Court ultimately did not reach the question. See *Thomas* v. *Chicago Park Dist.*, 122 S. Ct. 775, 781 (2002) ("Because the Park District's ordinance is not subject to *Freedman*'s procedural requirements, we do not reach one of the questions on which we granted certiorari, and on which the Courts of Appeals are divided: whether the requirement of prompt judicial review means a prompt judicial determination or the prompt commencement of judicial proceedings." (citing, *inter ālia*, *Nightclubs, Inc.* v. *Paducah*, 202 F.3d 884 (CA6 2000)); *City News & Novelty* v. *Waukesha*, 531 U.S. 278, 281 (2001) ("Courts have divided over the meaning of *FW/PBS*'s 'prompt judicial review' requirement. * * * We granted certiorari to resolve the conflict. 530 U.S. 1249 (2000). We now find, however, that the issue stemming from *Freedman* is not genuinely presented to us in this case." (citations omitted)).

This Petition presents the Court with an ideal vehicle to finally decide the issue. The provisions of the Metropolitan Code of Nashville and Davidson County governing the licensing of adult businesses specify that any adverse administrative decision "may be immediately appealed." The Code does *not*, however, guarantee that the appeal will be decided by a date certain. Applying its earlier decision in *Nightclubs, Inc.*, *supra*, the Sixth Circuit held that the Ordinance is invalid because "the Ordinance's judicial review

provisions do not guarantee prompt judicial review, as required by the First Amendment." Pet. App. 33a.

Because at least four circuits would reach the opposite result on this important and frequently recurring question of constitutional law (see *Thomas*, *supra*, 122 S. Ct. at 781 (citing decisions of the First, Fifth, Seventh, and Eleventh Circuits holding that the First Amendment does not require a "prompt judicial determination" on appeals from adult-business licensing decisions)), certiorari should be granted.

* * * *

This is, hopefully, the final chapter in respondents' long-running and largely unsuccessful effort to invalidate petitioner's regulation of adult businesses. The Sixth Circuit rejected numerous challenges to Chapter 6.54 of the Metropolitan Code of Nashville and Davidson County ("the Ordinance"), which governs adult-business licensing, but (by a divided vote) ultimately invalidated the Ordinance *in toto* because it failed to guarantee "prompt judicial review" of an adverse administrative licensing decision.

1. The Ordinance requires that adult businesses hold licenses to operate. See Ord. § .030(A).[2] Initial decisions regarding the issuance, renewal, and revocation of licenses are made at the administrative level by the Metropolitan Government based on criteria unrelated to the content of any speech. See *id.* §§ .040(C)(2), .110(K), .150(A)(1)-(10). The Ordinance requires the government to rule on applications for new licenses and applications to renew licenses within forty-seven days. See generally Pet. App. 99a-100a (district court's explanation of timing at municipal level).[3]

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[2] Citations to "Ord. § .xxx" are to subsections of Chapter 6.54.

[3] The Ordinance similarly requires that adult-entertainment dancers (denominated as "entertainers" by the Ordinance) hold "permits." See Ord. § .060(A). Because the Ordinance treats appeals by entertainers identically to appeals by adult businesses (compare Ord. § .070(D)(2) with *id.* § .040(E)(2)), this Petition's references to "adult businesses" also

This Petition concerns the Ordinance's provisions for judicial review of adverse administrative rulings. An adult business may "immediately appeal[]" any adverse administrative decision by seeking a common law writ of certiorari from a state trial court. See Ord. §§ .040(E)(2) (new business licenses), .070(D)(2) (new entertainer permits), .110(M) (renewal of licenses and permits), .150(E)(6) (revocation of licenses and permits).[4]

A metropolitan government such as petitioner has no power to require a state court to grant a writ of certiorari or to act on an appeal by any particular date. To obviate any potential First Amendment concerns arising from the prospect that a trial court might decline to hear appeals by existing businesses such as respondents that have been ordered to cease operations, the Ordinance provides that the administrative ruling is void unless considered by the court on appeal and sustained. The Ordinance thus provides that, if respondents appeal, the adverse administrative decision "shall not take effect until that decision has been upheld by the court after adjudication *on the merits*." See Ord. §§ .040(E)(3) (emphasis added), .070(D)(3). If the trial court delays its decision on the merits more than forty days from the filing of the appeal, an interim license is automatically granted. See *id.* If the trial court grants the writ, and thus determines to consider the appeal, state law requires that "the court shall hear the matter and issue its decision within forty (40) days" thereafter. Tenn. Code Ann. § 27-9-111.

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encompass "entertainers," while references to "licenses" also encompass "permits."

[4] Although an adult business uniformly may "immediately appeal[]," the Ordinance's judicial review provisions vary in other respects, at least in form, depending on whether the adult business is already operating at the time of the administrative ruling. Compare, *e.g.*, Ord. § .040(E)(3) with *id.* § .040(E)(4). Because each of the respondents is, in fact, already operating, the text discusses the provisions applicable to them.

2. Respondents are existing adult businesses and adult-entertainment dancers. Upon the initial enactment of the Ordinance in 1997, respondents sued petitioner pursuant to 42 U.S.C. § 1983, alleging that various provisions, including particularly those governing judicial review, violated the First Amendment. See generally Pet. App. 4a-5a (detailing the case's procedural history). The district court preliminarily enjoined the Ordinance as then enacted for failure to provide adequate judicial review. See *id.* 111a-128a.[5]

After various amendments were made to the Ordinance and to state law, the district court held the judicial review provisions to be constitutional and lifted the injunction. See Pet. App. 96a-110a. The court found that certiorari review sufficiently protects adult businesses' First Amendment interests, adopting the view of "the state courts * * * that a violation of a constitutional standard falls within the definition of 'illegal, arbitrary, or fraudulent' actions which are reviewable under common law writs." *Id.* 106a. As to the timing of judicial review, the court found it particularly important that "once the appeals process is initiated, the adverse decision is further stayed until the court upholds the decision after adjudication on the merits." *Id.* 99a. As a result, "the amended Ordinance does, in fact, provide for the maintenance of the status quo pending judicial review." *Id.* Furthermore, once the trial court grants the writ of certiorari, the case must be "heard and decided within 40 days." *Id.* 103a.[6]

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[5] In later rulings not implicated by this Petition, the district court invalidated several provisions of the Ordinance while sustaining others. See Pet. App. 45a-89a. Petitioner and respondents appealed and cross-appealed from those rulings. In a consolidated opinion, the Sixth Circuit rejected all of respondents' challenges (see *id.* 6a-25a) except as to the judicial review question presented by this Petition (*id.* 25a-34a) and an incidental definitional provision (*id.* 6a-9a).

[6] Earlier in the litigation, petitioner had asserted that the denial of a writ of certiorari constitutes a "decision on the merits" for purposes of

On respondents' appeal from the district court's ruling sustaining the amended judicial review provisions, a divided panel of the Sixth Circuit reversed. Pet. App. 25a-34a. Initially, the court of appeals held that respondents' claims were properly presented. Although respondents were not immediately threatened with the denial of a license, the court concluded that they have standing to present "a facial challenge" to the judicial review provisions applicable to them because "[a] mere threat to First Amendment interests is a legally cognizable injury." *Id.* 27a. For similar reasons, although the entertainer respondents had not yet been required to secure a license (as a result of the parties' agreement during the course of the litigation), their parallel challenges to the judicial review provisions were "ripe." *Id.* 28a.

On the merits, the Sixth Circuit majority accepted respondents' "argument that the Ordinance fails to provide the prompt judicial review required of prior restraint schemes by *Freedman* v. *Maryland*, 380 U.S. 51 (1965)," because "it fails to protect their right to expeditious judicial review on the merits." Pet. App. 25a-26a. In reaching that conclusion, the court applied its prior holding in *Nightclubs, Inc.* v. *Paducah*, 202 F.3d 884 (2000), that adult-business licensing schemes are fully subject to "at least the first two *Freedman* procedural safeguards":

> First, the decision whether or not to grant a license must be made within a specified, brief period, and the status quo must be preserved pending a final judicial determination on the merits. Second, the licensing scheme "must also assure a prompt judicial

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Tennessee law. As explained in the text, the district court disagreed, concluding that a "decision on the merits" is issued only if the trial court grants the writ and decides the appeal. Petitioner has since accepted that construction of state law (*e.g.*, Pet'r C.A. Br. 13 (administrative ruling is ineffective unless "upheld by a court"), as did the Sixth Circuit (see *infra* at 7).

> decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license."

*Id.* 30a (citation omitted) (quoting *Freedman*, 380 U.S. at 59).

In applying that standard to Chapter 6.54, the Sixth Circuit majority relied on the fact that (on its view of Tennessee law), a court is not obligated to grant a writ of certiorari and decide an appeal by any particular deadline, or indeed at all. Viewing the writ as "a matter of discretion" rather than "right" even in First Amendment matters, the majority could not "agree that this discretionary writ guarantees an aggrieved applicant that a court will hear and decide the merits of her claim, as required by *Freedman*." Pet. App. 31a-32a (citation omitted).

The majority immediately recognized that concerns regarding the possible unavailability of judicial review were grossly overstated, however, because if the trial court did not grant the writ of certiorari and decide the appeal "on the merits," respondents would *automatically prevail*. "The Ordinance does preserve the status quo by allowing existing businesses to continue to operate until an adjudication *on the merits* and by issuing a temporary license to new businesses if the court fails to rule within forty days of the filing of an appeal." *Id.* 33a n.8 (emphasis added). But the majority concluded that "[m]erely preserving the status quo * * * is not sufficient to satisfy *Freedman*" because, as is relevant here, "the licensing scheme 'must assure a prompt judicial decision.'" *Id.* Given that trial courts are not subject to a time limit in granting writs of certiorari, the court held the Ordinance's judicial review provisions unconstitutional and, on that basis, invalidated the Ordinance in its entirety. *Id.* 33a-34a.

Judge Wellford dissented from the majority's holding that the Ordinance was unconstitutional for failure to guarantee a "prompt judicial decision." Pet. App. 35a-41a. "If the applicant * * * does choose to appeal by seeking a writ

of certiorari, he or she is provided with a prompt record and an opportunity to challenge the procedures involved in a denial." *Id.* 40a. Moreover, "[t]here is not only such a provision but there is also a reasonable stay provision to protect a plaintiff pending judicial review":

> The majority opinion states * * * that "the ordinance does preserve the status quo by allowing existing businesses to continue to operate *until an adjudication on the merits* and by issuing a temporary license to new businesses if the court fails to rule within forty days of the filing of an appeal." (Emphasis added.) I agree with this interpretation of the effect of the ordinance, and this also presents an adequate and reasonable bulwark constitutionally, in my view.

*Id.* (alteration in original).

3. After the Sixth Circuit denied rehearing and rehearing *en banc* (Pet. App. 42a), this Petition followed.

## REASONS FOR GRANTING THE WRIT

The grounds for granting certiorari to review the Sixth Circuit's judgment in this case are straightforward.

The circuits are split over the principal question presented by this Petition: whether, under *FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215 (1990), and *Freedman* v. *Maryland*, 380 U.S. 51 (1965), the First Amendment mandates that an adult business receive a "prompt judicial determination" on appeal from the denial of a license to operate or whether it instead requires only that the business have "prompt access" to judicial review. In this case, the Sixth Circuit adhered to its ruling in *Nightclubs, Inc.* v. *Paducah*, 202 F.3d 884 (2000), that the Constitution requires a "prompt judicial determination." As this Court detailed in *Thomas* v. *Chicago Park District*, 122 S. Ct. 775, 781 (2002), the Fourth and Ninth Circuits agree with that holding, while the First, Fifth,

Seventh, and Eleventh Circuits disagree. The split is, moreover, irreconcilable without this Court's intervention, given that each side of the conflict has been joined not only by multiple circuits but by an *en banc* court. Compare *11126 Baltimore Blvd.* v. *Prince George's County*, 58 F.3d 988, 998-1001 (CA4 1995) (en banc) with *Graff* v. *Chicago*, 9 F.3d 1309, 1324-25 (CA7 1993) (en banc).

The circuit conflict is also important, as is evident from the fact that this Court granted certiorari to resolve it in both *Thomas*, *supra*, and *City News & Novelty* v. *Waukesha*, 531 U.S. 278 (2001). In the sixteen states (including Tennessee) that are subject to the "prompt judicial determination" requirement, municipalities are substantially constrained in their ability to regulate adult businesses, since they are generally powerless to require state courts to decide appeals by a fixed date. The large number of federal appellate decisions addressing the question also demonstrates that it recurs frequently.

This Petition is an ideal vehicle to resolve the conflict. Chapter 6.54 provides that any adverse licensing decision "may be immediately appealed" through the common law writ of certiorari. Neither the Ordinance nor state law, however, mandates that the reviewing court grant the writ, and thus hear the appeal, by a date certain. The Sixth Circuit majority accordingly held that "the Ordinance's judicial review provisions do not guarantee prompt judicial review, as required by the First Amendment." Pet. App. 33a.

The Sixth Circuit's characterization of the Tennessee common law writ of certiorari as "discretionary" does not detract from the square conflict presented by the Petition. The majority below construed Tennessee law to confer on trial courts the power to decline to grant a writ of certiorari, even in First Amendment cases. See Pet. App. 33a. But in an accompanying footnote, the majority immediately acknowledged that the Ordinance obviates entirely its concern

that a trial court could decline to issue a writ of certiorari. *Id.* 33a n.8. Because a municipality such as petitioner is powerless to *force* a state court to grant a writ of certiorari, the Ordinance provides that any administrative decision against existing businesses such as respondents is ineffective unless and until sustained "on the merits" by the reviewing court. Thus, if the trial court declines to grant the writ, the adult business prevails as a matter of right. *Id.*; see also *id.* 40a (Wellford, J., dissenting); *id.* 99a (district court's decision).[7] The only conceivable infirmity in that arrangement is that the adult business is not guaranteed that its appeal will be heard and decided by a particular date, which gives rise to the circuit conflict presented by this Petition.[8]

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[7] Even if this Court read the Sixth Circuit to hold separately, as a preliminary matter, that the First Amendment guarantees an adult business a right to judicial review even when the business will *automatically prevail* if judicial review is withheld, that holding would be encompassed within the first question presented. See Pet. i ("Does Chapter 6.54 satisfy the First Amendment because it sufficiently guarantees "prompt access to judicial review * * *?"). Review would be appropriate because, so far as petitioner can determine, no other court has extended the First Amendment to mandate such an abstract right of judicial review and to impose on municipalities the impossible burden of requiring state courts, over which they have no authority, to assume jurisdiction on appeal from a municipal ruling by a date certain.

[8] It also bears noting that the majority's suggestion that a state court could decline to issue a writ of certiorari in a First Amendment case is hypothetical, and there is no dispute that the writ would be denied, if ever, only in the most extraordinary circumstances. The district court, which is necessarily more familiar with state law, understood the state precedents, binding in every respect upon the state's trial courts, to mandate the issuance of writs of certiorari, albeit not on any particular deadline, when an administrative ruling prohibits speech activities. *Id.* 106a. That represents the better view. See, *e.g.*, *Hoover, Inc.* v. *Metro Bd. of Zoning Appeals*, 924 S.W.2d 900, 905 (Tenn. App. 1996) (right to writ of certiorari exists when party alleges denial of constitutional rights because such an allegation asserts that challenged action is "illegal, arbitrary or fraudulent"); see also *State* v. *Johnson*, 569 S.W.2d 808, 815 (Tenn. 1978) (right to writ of certiorari exists when denial would be "tantamount to the

Nor are there any other obstacles to certiorari. Unlike *Thomas*, *supra*, this case involves precisely the type of adult-business licensing ordinance over which the courts of appeals have divided. Unlike the adult business in *City News & Novelty*, respondents in this case remain in business and there is, accordingly, no prospect of mootness. Finally, although petitioner previously contested respondents' standing to bring this pre-enforcement challenge, as well as the ripeness of the claims of the individual entertainers, Petitioner accepts that the Sixth Circuit correctly held (see Pet. App. 27a-28a) that respondents may challenge the judicial review provisions of the Ordinance to which they are subject. See *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988) (in a First Amendment overbreadth challenge, "one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license").

Even if this Court adopts the minority view that the First Amendment guarantees adult businesses a right to a "prompt judicial determination," the second question presented by this Petition presents an ideal opportunity to define the bounds of that requirement in light of the additional procedural protections that the Ordinance provides. Although the Ordinance does not guarantee that an appeal by an adult business will be decided by a date certain, it does protect respondents' interests by automatically staying any adverse administrative ruling until the case is resolved "on the merits." In addition, the business is automatically issued an interim license in the event that the appellate process is not concluded within forty days.

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denial to either party of a day in court"). The subtext of the Sixth Circuit's contrary decision is the view, offensive to basic notions of federalism, that state court judges are less than faithful in their adherence to the law and to their respect for constitutional rights. See *Walton* v. *Arizona*, 497 U.S. 639, 653 (1990); *Espinosa* v. *Florida*, 505 U.S. 1079, 1082 (1992); *Black* v. *Romano*, 471 U.S. 606, 615 (1985).

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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March 7, 2002

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deja Vu of Nashville, Inc., a Tennessee corporation; Michael Rucker, individually; Michael Butler, individually; Meroney Entertainment, Inc., d/b/a Ken's Gold Club, a Tennessee corporation; The Pleasure Palace, Inc., a Tennessee corporation; Dawn Pierce, individually; Elizabeth Martz, individually; Jerry C. Pendergrass, individually; The 822 Corporation; The 421 Corporation, Plaintiffs-Appellants (99-5071), Plaintiffs-Appellees (00-5881), Plaintiffs-Appellees/Cross-Appellants (00-5284/5288),

v.

The Metropolitan Government of Nashville and Davidson County, Tennessee; Emmett Turner, Chief of Police of the Metropolitan Police Department, Defendants-Appellees (99-5071), Defendants-Appellants (00-5881), Defendants-Appellants/Cross-Appellees (00-5284/5288).

Nos. 99-5071; 00-5284/5288/5881

Argued: January 24, 2001

Decided and Filed: December 6, 2001

Appeal from the United States District Court for the Middle District of Tennessee at Nashville. Nos. 97-01066, 97-01176—John T. Nixon, Thomas A. Higgins, District Judges.

Before: MARTIN, Chief Judge; WELLFORD and SUHRHEINRICH, Circuit Judges.

## COUNSEL

ARGUED: Bradley J. Shafer, SHAFER & ASSOCIATES, P.C., Lansing, Michigan, for Plaintiffs. Karl F. Dean, METROPOLITAN GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY, Nashville, Tennessee, for Defendants.

ON BRIEF: Bradley J. Shafer, Andrew K. Wilkins, SHAFER & ASSOCIATES, P.C., Lansing, Michigan, Michael F. Pleasants, Memphis, Tennessee, H. Louis Sirkin, Laura A. Abrams, Jennifer M. Kinsley, SIRKIN, PINALES, MEZIBOV & SCHWARTZ, Cincinnati, Ohio, John E. Herbison, Nashville, Tennessee, for Plaintiffs. Francis H. Young, Shayna R. Abrams, METROPOLITAN DEPARTMENT OF LAW, Nashville, Tennessee, for Defendants.

MARTIN, C.J., delivered the opinion of the court, in which SUHRHEINRICH, J., joined. WELLFORD, J. (pp. 37-43) delivered a separate opinion concurring in part and dissenting in part.

## OPINION

BOYCE F. MARTIN, JR., Chief Judge. On August 19, 1997, the Council for the Metropolitan Government of Nashville and Davidson County, Tennessee, passed an ordinance, now codified as Metropolitan Code of Laws Chapter 6.54, "Sexually Oriented Businesses," containing licensing requirements for adult entertainment businesses. Shortly thereafter, plaintiffs in this consolidated appeal filed suit in federal court to enjoin the Ordinance's enforcement on First and Fourteenth Amendment grounds. Since that time,

injunctions have been issued, dissolved, and issued anew in response to the four amended versions of the Ordinance enacted by Metropolitan Nashville during the four-year pendency of this litigation.[1] The parties now appeal and cross-appeal various aspects of the district court's injunctive and procedural rulings.

I.

The Ordinance requires all "sexually oriented businesses" to obtain a license issued by the Sexually Oriented Businesses Licensing Board before being permitted to operate. *See* Metropolitan Code of Laws § 6.54.030(A). Additionally, all entertainers working within a sexually oriented business must obtain a permit from the Board. *See* M.C.L. § 6.54.060(A). The permit requirements are essentially identical to the license requirements. *See* M.C.L. § 6.54.080(A). Licenses and permits must be renewed on a yearly basis, and can be suspended or revoked for, among other things, repeated failure to comply with any of the licensing or permitting requirements, failure to pay required fees, or knowingly denying access to law enforcement personnel during business hours. *See* M.C.L. §§ 6.54.110; 6.54.150(A)(2), (3), and (6). The Ordinance includes a civil disability provision (M.C.L. §§ 6.54.050(B)(2); 6.54.080(A)(2)), a disclosure provision (M.C.L. §§ 6.54.040(A)(5); 6.54.070 (A)(4)), and a no-touch/buffer zone provision (M.C.L. § 6.54.140(C)), applicable to all license and permit-seekers. Metropolitan Nashville charges applicants five hundred dollars to apply for a license, and one hundred dollars to apply for a permit. *See* M.C.L. § 6.54.090.

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[1] Although Metropolitan Nashville has enacted four new versions of the Ordinance in response to various rulings by the district court, with the most recent version enacted in 2000, only the 1999 version is relevant to this appeal. Every citation thus will be to the 1999 version unless otherwise noted.

The plaintiffs are a group of establishments and individuals providing adult entertainment in the form of live nude or semi-nude performance dance, as well as selling, renting or presenting sexually oriented books, magazines, and videos. The "Deja Vu plaintiffs" include four corporations, two owner/operators, and two dancers. The "Pendergrass plaintiffs" include two corporations and one owner/operator. All the plaintiffs fall within the Ordinance's definitions of either "sexually oriented business," "operator," or "entertainer," and thus each is subject to the Ordinance's requirements. *See* M.C.L. §§ 6.54.010(G), (P), and (Y), respectively.

In October 1997, the Deja Vu plaintiffs sought a preliminary injunction based solely on the ground that the Ordinance failed to provide prompt judicial review of licensing decisions by the Board. The Deja Vu plaintiffs reserved their right to request a future preliminary injunction on other grounds. Shortly thereafter, the Pendergrass plaintiffs filed a similar complaint, requesting a preliminary injunction on the grounds that the Ordinance failed to provide prompt judicial review of licensing decisions and that its civil disability provisions violated the First Amendment. On December 11, the district court consolidated the two cases and granted a preliminary injunction because the Ordinance failed to provide for prompt judicial review; the district court did not address the constitutionality of the disability provisions. Metropolitan Nashville subsequently amended the Ordinance, and, on December 7, 1998, the district court dissolved the preliminary injunction. The plaintiffs timely appealed the dissolution.

The plaintiffs also moved for another preliminary injunction, raising all of their constitutional challenges to the Ordinance. On October 1, 1999, the district court granted the motion, finding the definitions of "sexually oriented" and "sexually oriented theater," the civil disabilities provision, the disclosure provision, and the fee amounts unconstitutional.

The court further found that the tainted provisions could not be severed, and therefore enjoined the entire Ordinance. In December, the district court made the preliminary injunction permanent. Metropolitan Nashville timely appealed the district court's decision striking down the definitions and the civil disability, disclosure, and fee provisions; the refusal to sever the tainted provisions; and the imposition of the permanent injunction. The plaintiffs timely cross-appealed the district court's decision upholding the Ordinance's definition of "sexually oriented business/establishment" and the buffer zone/no-touch provision. The plaintiffs also appealed the district court's grant of a protective order to Metropolitan Nashville.

In early 2000, Metropolitan Nashville again amended the Ordinance to remove the portions that the district court found unconstitutional, and then filed a Rule 60(b) motion to dissolve the injunction with the district court. The district court denied the motion on the grounds that it no longer had jurisdiction over the case because Metropolitan Nashville had already appealed its judgment to this Court. Metropolitan Nashville timely appealed that decision as well.

II.

As an initial matter, we note that none of Metropolitan Nashville's issues on appeal have been rendered moot by the current version of the Ordinance, which was enacted in early 2000. "[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Here, Metropolitan Nashville explicitly enacted the 2000 version in order to enforce the Ordinance pending this appeal. It has repeatedly expressed its intention to reenact those portions of the Ordinance judged unconstitutional by the district court at the earliest opportunity. Accordingly, we must now address the constitutionality of the following portions of the

Ordinance: the definitions of "sexually oriented," "sexually oriented business/establishment," and "sexually oriented theater;" the civil disability provision; the disclosure provision; the fees provision; the buffer zone/ no touch provision; and the mechanisms provided for judicial review. We review a district court's decision to grant or deny a permanent injunction, including both its factual and legal conclusions, *de novo* when constitutional facts are at issue. *See Women's Medical Professionals Corp. v. Voinovich*, 130 F.3d 187, 192 (6th Cir. 1997). All other factual findings are reviewed for clear error. *See id.*

A.

First, we must examine the Ordinance's definitions of "sexually oriented," "sexually oriented business/establishment," and "sexually oriented theater" to determine whether they are unconstitutionally overbroad. A law is overbroad under the First Amendment if it "reaches a substantial number of impermissible applications" relative to the law's legitimate sweep. *New York v. Ferber*, 458 U.S. 747, 771 (1982). The overbreadth doctrine exists "to prevent the chilling of future protected expression." *Staley v. Jones*, 239 F.3d 769, 779 (6th Cir. 2001). Therefore, any law imposing restrictions so broad that it chills speech outside the purview of its legitimate regulatory purpose will be struck down. For the same reason, the plaintiffs have standing to challenge the Ordinance's overbreadth even though they do not dispute that the Ordinance applies to each of them. "The overbreadth doctrine constitutes an exception to traditional rules of standing" and allows claimants to assert the rights of parties not before the court. *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 135 (6th Cir. 1994).

We agree with the district court that the definition of "sexually oriented" is unconstitutionally overbroad. In relevant part, the Ordinance defines "sexually oriented" as "any exhibition of any motion pictures, films or videos

depicting 'specified sexual activities' or 'specified anatomical areas.'" M.C.L. § 6.54.070(Y). "Specified anatomical areas" include "[l]ess than completely and opaquely covered" buttocks and female breasts. M.C.L. § 6.54.010(BB). Thus, any movie or video featuring a single shot of a person's nude or partially-covered buttocks or a woman's partially covered breast is a "sexually oriented" film under the Ordinance, irrespective of whether the film's content constitutes "adult entertainment" or causes the type of secondary effects, such as crime (sexual and nonsexual) and public health risks, that Metropolitan Nashville seeks to regulate. Because this definition could apply to a range of expression that does not cause the secondary effects that the Ordinance was aimed to prevent, it is overbroad.

We do not, however, find the definition of "sexually oriented business/establishment" overbroad. The Ordinance defines a "sexually oriented business/establishment" at Section 6.54.010(Z) as:

> Any commercial establishment which for a fee or incidentally to another service, regularly presents material or exhibitions distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observations by patrons therein.

Four subsections then follow this definition, defining the terms "sexually oriented bookstore," "sexually oriented nightclub," "sexually oriented theater," and "sexually oriented video store." M.C.L. §§ 6.54.010(Z)(1) - (4). If the "sexually oriented business/establishment" definition stood alone, we would find it unconstitutionally overbroad, as it could encompass such businesses as a hotel that offers its guests access to an adult cable channel. The record reflects, however, that a business will be subject to the Ordinance's licensing

requirements only if the business satisfies both the "sexually oriented business/establishment" definition *and* one of the four subsections' definitions. When read in conjunction with the four subsections, the definition no longer sweeps too broadly.

For the same reason, we find no constitutional problem with the Ordinance's definition of "sexually oriented theater," the only subsection definition challenged by the plaintiffs on appeal. "Sexually oriented theater," defined in Section 6.54.010(Z)(3), means:

> [A]n enclosed area, not including a booth, regularly used for presenting films, motion pictures, videocassettes, slides, or other photographic reproductions or other material depicting, describing, or relating to "specified sexual activities" or "specified anatomical areas," as defined in this section, for observation by patrons therein.

"Specified sexual activities" include sexual intercourse and fondling of buttocks or breasts. *See* M.C.L. § 5.43.010(CC). A significant number of mainstream movies depict people fondling breasts or buttocks, and an even larger number "relate to" sex. Again, the risk that this definition might chill a range of protected speech would require us to find it unconstitutionally overbroad if it stood alone. The additional requirement of being a "sexually oriented business/establishment," however, narrows the Ordinance's application to those theaters that regularly present material distinguished or characterized by an emphasis on sex acts or particular body parts. Again, reading the definitions together saves the parts from overbreadth.[2]

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[2] We note that these constitutional issues would never have arisen had the Ordinance been written more clearly. Section 6.54.010(Z) could have simply stated that its definition must be read in conjunction with its subsections. Alternatively, the Ordinance could have defined "sexually

Finally, even though we find the Ordinance's definition of "sexually oriented" overbroad, we must, if possible, give effect to the Ordinance's severability clause so as not to invalidate the entire act. *See Moore v. Fowinkle*, 512 F.2d 629, 637 (6th Cir. 1975). By including a severability clause, found at Section 6.54.170, Metropolitan Nashville created a presumption that it did not intend the statute's validity to hinge on any constitutionally infirm provision. *See Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 932 (1983). We find that the definition of "sexually oriented" can easily be severed from the Ordinance without having any impact on the licensing scheme. In fact, we are a bit confused as to why this definition had to be litigated at all, as Metropolitan Nashville argues strenuously in its brief that it is superfluous. Our independent review of the Ordinance reveals that, indeed, the phrase "sexually oriented" is never used but in conjunction with some other word that has its own definition. *See generally* § 6.54.010 (containing definitions of "sexually oriented films," "sexually oriented theaters," and "sexually oriented nightclubs," to name a few). For whatever reason, Metropolitan Nashville saw fit to have us decide whether this apparently meaningless term must be removed from its Ordinance. We have and it must.

B.

Metropolitan Nashville next appeals the district court's decision that the Ordinance's "civil disabilities provisions" violate the First Amendment. Under those provisions, no individual license or permit applicant who has had a misdemeanor conviction for a crime of a sexual nature may

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oriented business/establishment" at Section 6.54.010(Z) as "any one of the following businesses," and then listed the four businesses currently defined in the subsections (with the necessary limiting language incorporated into each business's definition). Whatever the difficulties inherent in writing laws, it is not too much to ask that municipalities carefully draft legislation intended to regulate protected activities.

receive a license or permit for two years following the date of the conviction.[3] *See* M.C.L. §§ 6.54.050(B)(2)(a); 6.54.080(A)(2)(a). No applicant who has had a felony conviction for a crime of a sexual nature may receive a license or permit for five years following the date of the conviction. *See* §§ 6.54.050(B)(2)(b); 6.54.080(A)(2)(b).

To satisfy Article III's standing requirement, (1) a plaintiff must have suffered some actual or threatened injury due to the alleged illegal conduct of the defendant; (2) the injury must be "fairly traceable" to the challenged action; and (3) there must be a substantial likelihood that the relief requested will redress or prevent the plaintiff's injury. *See Coyne v. American Tobacco Co.*, 183 F.3d 488, 494 (6th Cir. 1999). The Supreme Court has further defined the injury-in-fact requirement by stating that a plaintiff must show "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Plaintiffs Deja Vu and Michael Butler, Deja Vu's former Vice-President, are the only Deja Vu plaintiffs who allege they have standing to challenge the civil disabilities provisions because Butler was convicted of statutory rape in 1995. Although they acknowledge Butler no longer works for Deja Vu, they claim that he quit his job only because Deja Vu was forced to seek a license in 1999, after the district court

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[3] The following constitute "crimes of a sexual nature" under the Ordinance: "the crimes of rape, aggravated rape, aggravated sexual assault, public indecency, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or crimes committed in a jurisdiction other than Tennessee which, if committed in this state, would have constituted the crimes listed above. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used to determine what classification the offense is given." M.C.L. § 6.54.010(D).

dissolved the first preliminary injunction and denied plaintiffs a stay pending its decision on their motion for a second preliminary injunction. Therefore, Deja Vu and Butler contend they were forced to choose between the "Scylla of intentionally flouting state law and the Charybdis of forgoing what [they believed] to be constitutionally protected activity." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974). They argue that they should not be denied standing to challenge the civil disabilities provisions merely because Butler no longer works for Deja Vu, when it was the enforcement of that very provision that forced Butler to resign.

Although attractive, this argument has no merit under standing jurisprudence. Because Deja Vu does not currently employ anyone who could arguably be subjected to the disabilities provisions, any threat it alleges with regard to those provisions is, by definition, hypothetical. Hypothetical injury does not equal injury-in-fact. *See Lujan*, 504 U.S. at 560. Moreover, Deja Vu did not rehire Butler as Vice-President when the district court enjoined enforcement of the civil disabilities provisions, nor does it allege any plans to do so should we uphold that injunction. Similarly, Butler does not allege he would seek such a job were it not for the disabilities provisions. Therefore, neither plaintiff has suffered a harm likely to be redressed by a favorable decision. *See Coyne*, 183 F.3d at 494 (citing *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982)). Because none of the other individual plaintiffs alleged that the civil disability provisions rendered them ineligible to receive a permit, we agree with Metropolitan Nashville that none of the Deja Vu plaintiffs have standing to challenge the civil disabilities provisions.

We find, however, that the Pendergrass plaintiffs do have standing to challenge the provisions. At the time the district court ruled on this issue, Jerry Pendergrass was an officer, a director, and the sole shareholder of the 822 Corporation. Pendergrass was convicted of a misdemeanor obscenity

offense on May 22, 1997, and he was required to apply for a license by March 15, 1999, within two years of the date of his conviction. Because of the civil disabilities provisions, Pendergrass, and consequently the 822 Corporation, was ineligible to receive an operating license. Accordingly, both parties have standing to challenge those provisions.

The Pendergrass plaintiffs' challenge has not been mooted merely because over two years have passed and his business now possesses an operating license, as this case falls squarely within the "capable of repetition, yet evading review" exception to mootness. *See Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). Under this exception, the Pendergrass plaintiffs must show that 1) the challenged action will be of a duration too short to be fully litigated prior to its cessation or expiration, and 2) there is a "reasonable expectation that the same complaining party will be subjected to the same action again." *Id.* Even if an applicant seeks a license the day after his or her misdemeanor conviction, that still leaves only two years for the applicant to exhaust the Ordinance's application and appeal procedures and fully litigate the claim in the federal courts. As a practical matter, this cannot be done. Additionally, because the range of disabling sex crimes is relatively large, and because, as Metropolitan Nashville itself points out, it is reasonably foreseeable that someone with a sex crime history will choose to work for or be involved with a sexually oriented business, there is a reasonable probability that a future person connected with the 822 Corporation will have a criminal history that renders the Corporation ineligible for a license under the civil disabilities provisions. Therefore, we will proceed to the merits of the plaintiffs' claim.

"[N]ude dancing of the type at issue here is expressive conduct," which falls "within the outer ambit of the First Amendment's protection." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion). Therefore, any ordinance regulating nude dancing must be analyzed to ensure it does not unduly impair the exercise of First Amendment

rights. The level of scrutiny we apply depends on the type of regulation we address. For instance, if the challenged law is "content based," that is, intended to impact speech, the law must survive strict scrutiny. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). "In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny," one which was first enunciated as a four-step test in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *Turner Broad.*, 512 U.S. at 642. Systems of prior restraint will be upheld only if they provide for prompt judicial review of all decisions denying the right to speak, while also passing the appropriate level of scrutiny. *See Freedman v. State of Maryland*, 380 U.S. 51, 58-59 (1965).

The plaintiffs argue that the Ordinance should be subjected to strict scrutiny because the civil disabilities provisions amount to an unlawful prior restraint in violation of the First Amendment. "A 'prior restraint' exists when speech is conditioned upon the prior approval of public officials," and any system of prior restraint carries a heavy presumption against its validity. *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 889 (6th Cir. 2000). Although the plaintiffs are correct in asserting that the Ordinance constitutes a system of prior restraint, that argument more properly applies to our examination of the Ordinance's mechanisms for providing prompt judicial review, *see* Part II. F, *infra,* rather than our decision of which level of constitutional scrutiny to apply. What the plaintiffs actually, though obliquely, argue here is that the Ordinance is content-based, and thus must withstand strict scrutiny. *See, e.g., Turner Broad.*, 512 U.S. at 642. Metropolitan Nashville responds that the Ordinance is a content-neutral regulation aimed at redressing the secondary effects of sexually oriented businesses that must satisfy the less-demanding four-part test of *O'Brien*.

We have previously recognized that ordinances aimed at regulating adult entertainment businesses constitute content-based regulations, but that 'a distinction may be drawn

between adult [businesses] and other kinds of [businesses] without violating the government's paramount obligation of neutrality" when the government seeks to regulate only the secondary effects of erotic speech, and not the speech itself. *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir. 1998). To withstand constitutional scrutiny, then, (1) the Ordinance must have been enacted within Metropolitan Nashville's constitutional power; (2) the Ordinance must further a substantial governmental interest; (3) the interest must be unrelated to the suppression of speech; and (4) the Ordinance may pose only an "incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest." *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 226 (6th Cir. 1995) (citing *O'Brien*, 391 U.S. at 377).

The parties agree that Metropolitan Nashville validly enacted the Ordinance. Additionally, Metropolitan Nashville's stated interests in reducing crime, open sex, and the solicitation of sex are substantial. *See Richland Bookmart, Inc.*, 137 F.3d at 440. Moreover, regulations aimed at redressing the secondary effects of the sex industry are unrelated to the suppression of erotic speech. *See East Brooks Books, Inc.*, 48 F.3d at 226. Therefore, we need only determine whether the Ordinance's civil disabilities provisions constitute merely an incidental burden on the plaintiffs' First Amendment rights that is essential to furthering Metropolitan Nashville's stated interest in battling the secondary effects of the sex industry.

The Supreme Court has recently noted that "crime and other public health and safety problems are caused by the presence of nude dancing establishments . . . ." *Pap's A.M.*, 529 U.S. at 300. The Ordinance's civil disabilities provisions serve to weed out those applicants most likely to engage in the type of criminal behavior that the Ordinance seeks to redress by temporarily disqualifying those who have recently committed such acts from working for sexually oriented

establishments, or alternatively, from declaring any sexually oriented establishment closely associated with such an individual ineligible to operate. In light of the temporary nature of the ban and the narrow reach of the provisions (applying only to those who have committed a felony sex crime within the last five years or a misdemeanor sex crime within the last two years), we do not find that these provisions violate the Constitution.

Contrary to the plaintiffs' arguments, our holding in *City of Paducah v. Investment Entm't, Inc.*, 791 F.2d 463 (6th Cir. 1986), does not control this case. In *City of Paducah*, we invalidated a municipal regulation that revoked all business licenses and permits from those businesses whose employees had distributed or exhibited obscene material. *See City of Paducah,* 791 F.2d at 464. In that case, however, we explicitly found that the purpose of the challenged portion of the regulation was "to control future expression by businesses that have been subjected to the nuisance abatement procedure." *Id.* at 470. In contrast, we find here that the Ordinance's civil disabilities provisions exist to combat the sex crimes connected with sexually oriented establishments by temporarily prohibiting those recently convicted of such crimes from employment with those establishments. Because both the Ordinance and the civil disabilities provisions are unrelated to speech, we are faced with a different issue than that decided in *City of Paducah*. Furthermore, because *City of Paducah* was a "prior restraint" case, it was concerned with whether the regulation at issue provided sufficient mechanisms for prompt judicial review. *See id.* We agree that the instant Ordinance must provide for prompt judicial review, and that such review must encompass any findings of ineligibility pursuant to the civil disabilities provisions. *See* Part II.F, *infra.* Nothing in the civil disabilities provisions themselves, however, renders them facially unconstitutional, and we decline to tie the hands of local governments by extending *City of Paducah*'s reasoning to those regulations

aimed only at redressing the secondary effects of the sex entertainment industry.

C.

Because the district court found the Ordinance's civil disabilities provisions unconstitutional, it also invalidated its "disclosure provisions" which require that applicants provide certain information in order to conduct a background check into each applicant's criminal history. The disclosure provisions require that license and permit applicants divulge such personal information as full name, height, weight, hair color, eye color, date of birth, current residential address, and all residential addresses for the prior three years. *See* §§ 6.54.040(A)(5)(a), (b), and (c); 6.54.070 (A)(4)(a), (b), (c), and (d). Additionally, applicants must provide their fingerprints and two portrait photographs to facilitate the background check, which the Metropolitan Police Department conducts. *See* §§ 6.54.040(A)(5)(g); 6.54.070(A)(4)(g). Because each plaintiff either has or will have to apply for either a permit or a license, all are required to provide this information to the Board. Accordingly, all the plaintiffs have standing to challenge this provision.

The Ordinance states that the required disclosures are "for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature." *See* M.C.L. § 6.54.040(A)(5)(c); M.C.L. § 6.54.070(A)(4)(c); M.C.L. § 6.54.070(A)(4)(d). Because this purpose is "unrelated to the suppression of expression," we again apply the four-part *O'Brien* test to determine whether the disclosure provisions are unconstitutional. *Pap's A.M.*, 529 U.S. at 289.

As stated above, *O'Brien* requires us to determine whether Metropolitan Nashville enacted the disclosure provisions (1) within its constitutional power, (2) to further a substantial governmental interest that is (3) unrelated to the suppression of speech, and whether (4) the provisions pose only an

"incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest." *East Brooks Books, Inc.*, 48 F.3d at 226. Here, Metropolitan Nashville legitimately enacted the disclosure provisions in order to facilitate the background check. In addition, the required disclosures ensure continuing compliance with the Ordinance's licensing and permitting requirements. Although the plaintiffs point to testimony by Metropolitan Police Department Vice Squad Captain Bawcum that only a person's name and date of birth are used to run a background check, they do not argue that the required disclosures do not further Metropolitan Nashville's substantial governmental interest in eradicating the secondary effects of sexually oriented businesses.[4] "States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker.'" *Borman's, Inc. v. Mich. Prop. & Cas. Guar. Assoc.*, 925 F.2d 160, 162 (6th Cir. 1991) (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)). The plaintiffs have failed to convince us that requiring identifying information as part of the application process does not facilitate enforcement of the Ordinance's provisions (for instance, by assuring that the entertainer displaying the permit matches the physical description contained in the applicant's

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[4] Simply because Metropolitan Nashville codified only its interest in facilitating the background checks as the justification for the required disclosures, we are not prohibited from taking into account other interests the disclosures may serve. "Our appropriate focus is not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582 (1991) (Souter, J., concurring in the judgment).

file). The provisions thus satisfy the first, second, and third parts of the *O'Brien* test.

The plaintiffs argue that the disclosure provisions fail the fourth prong, however, because under the Tennessee Open Records Act, members of the public with illicit motives can easily obtain the personal information contained in the plaintiffs' application files, which includes their names and residential addresses. Therefore, the provisions will pose more than an incidental burden on First Amendment activities because those wishing to engage in such activities will be chilled by the threat of public exposure and possible violence. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (stating purpose of First Amendment is "to protect unpopular individuals from retaliation - and their ideas from suppression"). Metropolitan Nashville responds that the required information is protected from public release (1) by the district court's order; (2) by Metropolitan Nashville's own opinion; (3) by the Tennessee Attorney General's opinion; and (4) by our decision in *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1064-65 (6th Cir. 1998) (finding release of certain personnel information constitutionally prohibited).

Metropolitan Nashville's first three arguments cannot stand. First, the district court sealed the application files only "during the pendency of this litigation," and therefore its order is insufficient to protect any applicant's information indefinitely. Second, neither Metropolitan Nashville nor the Tennessee Attorney General have the power to create exceptions to Tennessee's Open Records Act. The Tennessee Supreme Court has interpreted the Tennessee Open Records Act, T.C.A. § 10-7-503(a), to mean that "the legislature reserved to itself alone the power to make public policy exceptions." *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d 681, 685 (Tenn. 1994) (quoting *Memphis Publ'g Co. v. Holt*, 710 S.W.2d 513, 517 (Tenn. 1986)). Nonetheless, we agree with Metropolitan Nashville that our decision in *Kallstrom* saves this provision from being unconstitutional by

prohibiting public release of all applicants' names and current and past residential addresses.

*Kallstrom* held that police officers have a constitutionally protected privacy interest in their otherwise-public personnel file information, which includes addresses, phone numbers, and family member information, when the release of that information creates "a very real threat to the officers' and their family members' personal security and bodily integrity, and possibly their lives." *Kallstrom*, 136 F.3d at 1063. Here, the plaintiffs presented significant evidence that the requirement that applicants submit their names and past and current addresses to a public forum poses serious risks to their personal security. For instance, plaintiff Dawn Pierce, an entertainer at Deja Vu, testified that entertainers in the past have been stalked, harassed, and injured by customers, and that she is afraid to make public her name and residential address, as required by the Ordinance, because of serious potential risks to her physical safety and well-being. Dancers use stage names and have unpublished addresses and telephone numbers in order to minimize the risks of such harassment. Additionally, Pierce testified that there are a number of local organizations that have taken a strong stance against her profession. She is therefore also concerned that requiring her to release her name and residential address to a public forum will result in such groups harassing her at her home as a result of her choice to engage in erotic speech. Such risks also apply to individual business associates, such as registered agents, officers, directors, certain shareholders, club managers, and assistant managers, all of whom are likely to have to provide their names and addresses to the Board. *See* M.C.L. § 6.54.040(A)(5)(i), (j).

Applying *Kallstrom*'s reasoning to this context, we find that all sexually oriented business license and permit applicants' names and current and past residential addresses constitute protected private information and are therefore exempted from Tennessee's Open Records Act. Metropolitan

Nashville cannot publicly release such private information; it can, however, require applicants to provide the identifying information to the licensing board for the limited purpose of ensuring compliance with the Ordinance's regulations, provided Metropolitan Nashville keeps that information under seal. "Anonymity is a shield from the tyranny of the majority," *McIntyre*, 514 U.S. at 357, but it is not a shield from all legitimate regulation. Therefore, as a result of our decision in *Kallstrom*, prohibiting public dissemination of the required private information, Metropolitan Nashville's disclosure requirements satisfy the fourth part of *O'Brien* because they are essential to ensuring continuing compliance with the Ordinance's licensing and permitting requirements, and because the reporting requirements pose only an incidental burden on applicants.

D.

The plaintiffs next challenge the constitutionality of the fees charged pursuant to the Ordinance. The government may not tax the exercise of a constitutionally protected right. *See Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1109 (6th Cir. 1997). Nonetheless, "an ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred in furtherance of a legitimate state activity." *Id.* at 1109-10. Such a fee is not excessive, even if it is more than nominal, so long as it is "reasonably related to the expenses incident to the administration of the ordinance." *Id.* at 1110.

The Ordinance charges applicants five hundred dollars for a license, and one hundred dollars for a permit. Additionally, the Ordinance requires that "[i]f the [license or permit] application is denied, one-half of the fee shall be returned." *See* M.C.L. § 6.54.090(A), (B). Although the district court found the direct cost of processing license applications was

thirty-three dollars, and the direct cost of processing permit applications was forty-three dollars, it failed to include in its calculations the $40,000 paid annually to an inspector "to enforce the civil disabilities provision," because it had already held that provision unconstitutional. The record reflects that comparing the yearly total of estimated fee revenue with the annual costs of enforcing the Ordinance results in a net loss to Metropolitan Nashville. Accordingly, we find that the fees charged are reasonably related to the expenses incident to the administration of the Ordinance.

E.

Next the plaintiffs raise challenges to the Ordinance's "no touch/buffer zone" provision. Section 6.54.140(C) states that

> No customer shall be permitted to have any physical contact with any entertainer on the licensed premises while the entertainer is engaged in a performance of live sexually oriented entertainment. All performances of live sexually oriented entertainment shall only occur upon a stage at least eighteen inches above the immediate floor level and removed at least three feet from the nearest customer.

As with any other violation of Chapter 6.54, one violation of the buffer zone may result in a five hundred dollar fine, suspension of the operating license for between five and thirty days, or both. *See* M.C.L. § 6.54.150(B)(2). A second violation within a two-year period requires suspension for between thirty-one and ninety days. *See* M.C.L. § 6.54.150(B)(3). A third violation will result in a one-year revocation of the license. *See* M.C.L. § 6.54.150(C)(9).

As an initial matter, we note that the three-foot buffer zone surrounds the stage, not the dancer. Therefore, we reject the plaintiffs' argument that the provision creates a "floating buffer zone." *See* M.C.L. § 6.54.140(C); M.C.L. § 6.54.050(A)(3) (stating "[a] three-foot boundary from the

outer edge of the stage shall be indicated on the floor . . . so that the customer will not invade the three-foot boundary").

We find that this provision also satisfies the *O'Brien* test: Metropolitan Nashville properly passed this portion of the Ordinance pursuant to its police power; it intended this provision to redress the high instances of sex crimes prevalent at sexually oriented businesses and to deter the spread of disease; and requiring dancers to perform on stages removed three feet from any customer poses only an incidental burden on their right to erotic speech that is no greater than is essential to further Metropolitan Nashville's substantial interests. *See DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 412-13 (6th Cir. 1997) (upholding six-foot buffer zone to more effectively enforce ban on contact between erotic dancers and audience members and to prevent occurrence of activities likely to result in criminal behavior or to prevent risk of disease).

We agree with the plaintiffs that the First Amendment protects the entertainers and audience members' right to free expressive association. They are certainly engaged in a "collective effort on behalf of shared goals." *See Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). The dancers and customers work together as speaker and audience to create an erotic, sexually-charged atmosphere, and although society may not find that a particularly worthy goal, it is a shared one nonetheless. The right to associate for expressive purposes, however, is not absolute. "Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 623. In attempting to restrict opportunities to engage in prostitution and to guard against the spread of disease through the public release or exchange of bodily fluids, Metropolitan Nashville has gone no farther than necessary by requiring a three-foot

distance between the erotic dancer and the audience. *See DLS*, 107 F.3d at 412-13.

The plaintiffs repeat the same arguments we rejected in *DLS*. First, they argue that the no touch/buffer zone provision goes too far because of its economic impact on the relevant market. Specifically, the plaintiffs point to evidence showing that compliance with the no touch/buffer zone provision will require extensive renovations of their clubs. We rejected that argument, however, in *DLS*, noting that the relevant inquiry is not whether the Ordinance will cause any economic impact on the sexually oriented businesses. *Id.* at 413. "[T]he First Amendment requires only that [Metropolitan Nashville] refrain from effectively denying [sexually oriented business owners] a reasonable opportunity to open and operate an adult theater within the city . . . ." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986). Although we do not doubt that compliance with the Ordinance will cut into the plaintiffs' profits, the plaintiffs have failed to introduce any evidence showing that they will not have a reasonable opportunity to operate their establishments.

Second, the plaintiffs argue that the provision denies to erotic dancers the ability to profit from their expression by foreclosing the possibility of receiving tips. The plaintiffs are correct that the government cannot prohibit compensation for the exercise of First Amendment rights. *See, e.g., Simon & Schuster v. Crime Victims Bd.*, 502 U.S. 105, 115-16 (1991). Customers, however, remain free under the Ordinance to tip dancers before or after their performances. Alternatively, the clubs could decide to increase dancers' salaries, rather than requiring them to earn a living wage from their tips. In any event, the no touch/buffer zone provision merely requires that audience members not hand the dancers money during their dances, a sufficiently limited burden on the plaintiffs' First Amendment rights. For a similar reason, we also reject the plaintiffs' argument that the buffer zone violates the First Amendment by prohibiting all verbal communication between

entertainers and customers. Again, if customers and entertainers cannot converse while standing a mere three feet apart, it is because the plaintiffs have chosen to play their music at such a volume that conversation is impossible. Contrary to the plaintiffs' claims, the Ordinance does not force entertainers to choose between verbal communication and no music; as Metropolitan Nashville suggests, the plaintiffs can simply turn their music down a bit. The point is that any problems dancers may experience with receiving tips or speaking with customers will be caused not by the Ordinance, but by the clubs' refusal to alter their standard operating procedures in response to these constitutional regulations.

Finally, the plaintiffs challenge the no touch/buffer zone provision on the ground that it does not contain a mens rea requirement. As the Ordinance does not expressly limit the prohibited touching to intentional or knowing touches, the plaintiffs claim that even entertainers who merely seek to push a customer away will violate it. We disagree with the plaintiffs' reading of this provision. The provision states, in relevant part, that "[n]o customer shall be permitted to have any physical contact with any entertainer" during a live performance, and that all such performances must occur on a stage "removed at least three feet from the nearest customer." M.C.L. § 6.54.140(C). Rather than reading the provision as enacting two separate requirements, we read it as a single mandate, with the "no touch" portion setting forth a broad policy statement that no contact between dancers and customers shall occur during performances, and the "buffer zone" rule showing the specific way to implement that policy by prohibiting clubs from allowing customers within three feet of the stage during dances. Therefore, the provision places a duty not on the entertainer to avoid touching customers, but on the owners and operators of clubs to protect entertainers from being touched by customers by requiring customers to stay three feet away from the stage. *See also*

§ 6.54.050(A)(3) (detailing the licensee club's responsibility for noticeably demarcating the three-foot buffer zone). Furthermore, logic compels this interpretation. It would simply be nonsensical for Metropolitan Nashville to put the onus of customer control on the entertainer who is already removed at least three feet from the customer, is engaged in live entertainment, and is, by definition, incapable of preventing an approaching customer from touching her without engaging in the prohibited touching herself. "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). Accordingly, we reject the plaintiffs' claim that the no-touch/buffer zone provision imposes *any* duty on entertainers, much less one that requires them to be held strictly liable for any violations.

Moreover, the Ordinance does not allow for strict liability, even for licensees. Section 6.54.150(B)(1) states that a club will be fined or have its license suspended (or both) for violating any of the Ordinance's provisions. However, Subsection (B)(1) also affords licensees the affirmative defense that management was "powerless to prevent" the violation. Accordingly, liability for violating the no-touch/buffer zone provision is limited to those instances where a licensee could have, but failed to prevent the proscribed conduct. The provision, thus interpreted, is constitutional.

F.

Finally, we address the plaintiffs' argument that the Ordinance fails to provide the prompt judicial review required of prior restraint schemes by *Freedman v. Maryland*, 380 U.S. 51 (1965). Specifically, the plaintiffs argue that because the Ordinance requires them to proceed to court via a common law writ of certiorari, it fails to protect their right to

expeditious judicial review on the merits. Before reaching that issue, however, we must address Metropolitan Nashville's argument that the plaintiffs have failed to present us with a justiciable controversy. We review issues of Article III justiciability *de novo*. *See NRA v. Magaw*, 132 F.3d 272, 278 (6th Cir. 1997).

1.

Metropolitan Nashville argues that the plaintiff businesses and operators have no standing to challenge the licensing procedures because they have all been issued licenses. For support, Metropolitan Nashville cites *DLS*, which held that a business and its owner did not have standing to challenge a licensing procedure under which they had already received licenses. *See DLS*, 107 F.3d at 413.

> If they are to be subject to any future threat of injury from actions by the City, that threat will arise under the materially different procedures for renewals or revocations of licenses. . . . Therefore, they cannot demonstrate that their challenge to the licensing procedures satisfies the three core requirements for standing under Article III.

*Id.*

Metropolitan Nashville misunderstands the plaintiffs' argument. Here, plaintiffs have raised a facial challenge claiming that the Ordinance's procedures for reviewing Board decisions fail to provide for prompt judicial review as required by *Freedman*. The appeal procedures under the Ordinance are essentially identical whether the Board initially refuses to grant a license, or whether the Board suspends or revokes an already-existing license. *See* §§ 6.54.040(E)(2) (procedure for appealing denial of license); 6.54.150(E)(6) (procedure for appealing suspension or revocation of license). Therefore, this case is distinguishable from the *DLS* scenario, where "[a]ny modification to the licensing scheme would

have no effect on the potential threat that [the plaintiffs] face under renewal or revocation proceedings." *See DLS*, 107 F.3d at 414.

It is immaterial that Metropolitan Nashville has not yet sought to suspend or revoke the plaintiffs' licenses. A mere threat to First Amendment interests is a legally cognizable injury. *See Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989). "In the area of freedom of expression, it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office . . . whether or not he applied for a license." *Freedman*, 380 U.S. at 56. Arguing that a statute lacks sufficient procedural safeguards is one way to allege overly broad licensing discretion.

> [Plaintiff's] argument is that, because the apparatus operates in a statutory context in which judicial review may be too little and too late, the . . . statute lacks sufficient safeguards for confining the censor's action to judicially determined constitutional limits, and therefore contains the same vice as a statute delegating excessive administrative discretion.

*Id.* at 57. "By the same token, . . . Plaintiff does not have to wait until his license is revoked to have standing to challenge the allegedly overbroad licensing scheme that would allow its revocation." *See G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1075 (6th Cir. 1994). Therefore, the plaintiff businesses and operators have standing to raise their facial challenge to the Ordinance.

Additionally, we find this case ripe for review. Ripeness requires that the "injury in fact be certainly impending." *NRA*, 132 F.3d at 280 (citation omitted). The doctrine exists "to ensure that courts decide only existing, substantial controversies, not hypothetical questions or possibilities." *Dixie Fuel Co. v. Comm'r of Soc. Sec.*, 171 F.3d 1052, 1057

(6th Cir. 1999) (internal quotation marks and citations omitted). In determining whether the entertainers' claim is ripe, we consider "whether the issues are fit for judicial decision as well as the hardship to the challenging party resulting from potential delay in obtaining judicial decision." *Id.* at 1058.

Metropolitan Nashville claims that the entertainers are not under any threat with regard to the Ordinance because the entertainers have not yet sought a permit. We disagree. The entertainers join with the other plaintiffs in challenging the Ordinance's judicial review provisions. Because this is a purely legal issue, and because, as already demonstrated, the plaintiffs have standing to raise it, the issue is fit for a judicial decision. Moreover, as Metropolitan Nashville acknowledges in its brief, "[p]arties not yet affected by the actual enforcement of the statute are allowed to challenge actions under the First Amendment in order to ensure that an overbroad statute does not act to 'chill the exercise of free speech and expression,' a constitutionally protected right." Gov. Br. at 12 (citing *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1182 (6th Cir. 1995)). The plaintiffs facially challenge the Ordinance's overbreadth, alleging that the lack of prompt judicial review vests too much discretion in the Board. By Metropolitan Nashville's own admission, then, their claim is ripe for review.

2.

We now turn to the merits of the plaintiffs' claim that the Ordinance constitutes a system of prior restraint, and that it fails to guarantee the requisite prompt judicial review of license/permit denials and revocations. We review a district court's order dissolving a preliminary injunction for an abuse of discretion, reviewing *de novo* where the dissolution is based upon a legal conclusion. *See Reese v. City of Columbus*, 71 F.3d 619, 622 (6th Cir. 1995). "A district court abuses its discretion when it relies on clearly erroneous findings of fact,

or when it improperly applies the law or uses an erroneous legal standard." *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1378 (6th Cir. 1995). "A factual or legal error alone may be sufficient to establish that the court abused its discretion in making its final determination." *Id.* (internal punctuation and citations omitted).

A district court must consider four factors when determining whether to grant or deny a preliminary injunction: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff may suffer irreparable harm absent the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of an injunction upon the public interest. *See Dixie Fuel Co.*, 171 F.3d at 1059-60. In First Amendment cases, the first factor will often be determinative. *See Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). This is because the Supreme Court has recognized that even minimal infringement upon First Amendment values constitutes irreparable injury. *See Newsom*, 888 F.2d at 378. Additionally, if the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment. *See Connection Distrib.*, 154 F.3d at 288. Moreover, "it is always in the public interest to prevent violation of a party's constitutional rights." *G & V Lounge, Inc.*, 23 F.3d at 1079. Accordingly, we shall focus our attention on the first factor.

A "prior restraint" exists when the exercise of a First Amendment right depends on the prior approval of public officials. *See Nightclubs, Inc.*, 202 F.3d at 889 (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975)). "Any system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity." *Freedman*, 380 U.S. at 57. In *Freedman*, a unanimous Supreme Court found that three procedural safeguards were required for a prior restraint scheme to avoid

constitutional infirmity. *See id.* at 58-59. First, the decision whether or not to grant a license must be made within a specified, brief period, and the status quo must be preserved pending a final judicial determination on the merits. *See id.* at 59. Second, the licensing scheme "must also assure a prompt judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Id.* Third, the licensing scheme must place the burden of instituting judicial proceedings and proving that expression is unprotected on the licensor rather than the exhibitor. *See id.* at 58. Licensing schemes in a city ordinance regulating sexually oriented businesses constitute a prior restraint that must incorporate at least the first two *Freedman* procedural safeguards. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229-30 (1990) (plurality opinion of O'Connor, J.);[5] *see also Nightclubs, Inc.*, 202 F.3d at 890; *East Brooks Books, Inc.*, 48 F.3d at 224.

Sections 6.54.040(E) and 6.54.070(D) of the Ordinance provide the procedures for obtaining relief from the denial of a license or permit:

> Any denial of an application for a license may be immediately appealed to the circuit or chancery courts of Davidson County. The metropolitan department of law may institute proceedings for a declaratory judgment. If the applicant chooses to appeal by filing a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within ten days from the date the

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[5] Three justices held only the first two *Freedman* safeguards applied, three justices would have applied all three, *see id.* at 238-39 (Brennan, J., concurring in the judgment), and three more would not have applied any. *See id.* at 244 (White, J., concurring in part and dissenting in part); *see also id.* at 253 (Scalia, J., concurring in part and dissenting in part). Accordingly, at a minimum, we must apply the first two *Freedman* safeguards.

> metropolitan government was served with a petition for a writ of certiorari.[6]

Tennessee state law requires that if an appeal is taken from an administrative decision barring an applicant from engaging in First Amendment activities, "the court shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari." T.C.A. § 27-9-111 (Michie 1999). The plaintiffs argue that these provisions fail to comply with the first two *Freedman* safeguards. We agree.

"Whether the common law writ of certiorari will issue is a matter of discretion. It is not issued as a matter of right." *Boyce v. Williams*, 389 S.W.2d. 272, 277 (Tenn. 1965). Thus, the Ordinance, in requiring that aggrieved applicants proceed to court via a discretionary route, fails to guarantee a "final judicial adjudication on the merits," as required under *Freedman*'s first safeguard. Metropolitan Nashville points to *State v. Johnson*, 569 S.W.2d 808 (Tenn. 1978), for support that Tennessee courts will not deny a writ in this context. *See id.* at 815 (finding that writs should issue where denial of the writ is "tantamount to the denial to either party of a day in court"). Even that case, however, reiterates the rule that "certiorari is a discretionary writ." *Id.* at 814 (noting that whether a lack of appellate remedy exists is "critical" for determining whether to grant a writ). Because Metropolitan Nashville has failed to demonstrate that the denial of a writ would be tantamount to the denial to an applicant of a day in court, we cannot agree that this discretionary writ guarantees

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[6] Although this language could be read as authorizing two avenues for appeal, a direct appeal by which Metropolitan Nashville does not have to file the record of all proceedings within ten days, and an appeal via a common law writ of certiorari whereby Metropolitan Nashville must timely file the record, Metropolitan Nashville insisted at oral argument that the provision authorizes only an appeal via the common law writ.

an aggrieved applicant that a court will hear and decide the merits of her claim, as required by *Freedman*.[7]

Metropolitan Nashville also argues that the plaintiffs' concern that the courts may not promptly determine whether or not to grant the writ petition is unfounded. For support, Metropolitan Nashville cites to an affidavit presented to the district court from the Clerk and Master for the Chancery Courts of Davidson County, stating that "[g]enerally, our office processes all petitions for a writ of certiorari . . . within two days of the filing of the petition." This anecdotal affidavit, however, is insufficient to establish that aggrieved applicants are *guaranteed* prompt judicial review.

First, the affidavit does not address Davidson County's circuit courts, where the Ordinance also directs that an aggrieved applicant's appeal may lie. Therefore, the record is completely absent of any evidence as to the turn-around time of petitions filed with the circuit court, and it was clearly erroneous of the district court to find otherwise. More importantly, the affidavit only avers the chancery court's *general* practice. The Constitution requires more. "[A]ny limiting construction must 'be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice.'" *Nightclubs, Inc.*, 202 F.3d at 891 n.6 (citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 700 (1988)). A well-established practice is one

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[7] Theoretically, for instance, an aggrieved applicant could file a § 1983 suit against the Board and its members. Although such a suit would not provide complete relief, as the applicant would be foreclosed from "speaking" until a final adjudication, it is a far cry from the facts of *Johnson*, where the court found the erroneous suppression of evidence would force Metropolitan Nashville to drop its criminal charges against the defendant and that double jeopardy would prohibit the city from filing new charges. In that context, Metropolitan Nashville would have literally had no legal recourse if the court had denied its petition for a writ of certiorari, and it is therefore at least potentially distinguishable from this case.

where "a well-understood and *uniformly applied* practice has developed that has virtually the force of a judicial construction." *City of Lakewood*, 486 U.S. at 770 n.11 (emphasis added). In the absence of such strong evidence, "[w]e can neither presume that municipal officials will act in good faith and respect a speaker's First Amendment rights, nor read a requirement into an ordinance that is not fairly and evidently present." *Nightclubs, Inc.*, 202 F.3d at 891 n.6. A "uniformly applied" practice is simply not the same as a "generally" applied one. Because the chancery court clerk's affidavit does not present such strong evidence, and because the record contains no evidence as to the circuit court's practices, we cannot agree with the district court that the Constitution's requirements have been satisfied by this proof.

Second, the affidavit purports only to describe the average length of time it takes to "process" all petitions for a writ of certiorari. It says nothing about whether the court is obligated to grant the writ at all, and therefore, it fails to address the biggest problem with the Ordinance's judicial review provision. Without some affirmative evidence showing that every writ of certiorari will be granted, we find that the Ordinance's judicial review provisions do not guarantee prompt judicial review, as required by the First Amendment.[8] The lack of a judicial review provision renders the entire statute facially unconstitutional, and therefore, severing the

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[8] The Ordinance does preserve the status quo by allowing existing businesses to continue to operate until an adjudication on the merits and by issuing a temporary license to new businesses if the court fails to rule within forty days of the filing of an appeal. *See* M.C.L. 6.54.040(E)(3) and (4); *see also* M.C.L. 6.54.070(D)(3) and (4) (applying same rules to permit applicants). Merely preserving the status quo, however, is not sufficient to satisfy *Freedman*. The decision whether or not to grant a license must still be made within a specified, brief period, and the licensing scheme "must *assure* a prompt judicial decision." *See Freedman*, 380 U.S. at 59 (emphasis added). The Ordinance's discretionary appeals procedure fails to satisfy these separate requirements.

ineffectual provision will not save the statute. Under these circumstances, we cannot give effect to the severability clause, but must enjoin enforcement of the entire Ordinance.

III.

In the first of two final matters, the plaintiffs ask us to vacate the magistrate's grant of a protective order to Metropolitan Nashville with regard to the plaintiffs' discovery requests dealing with Metropolitan Nashville's basis for believing sexually oriented businesses cause "secondary effects." The plaintiffs concede, however, that although they moved for the district court to review the magistrate's decision, the court did not rule on the motion before issuing its decisions enjoining the Ordinance's enforcement. We decline to rule on the propriety of the magistrate's order before the district court has a chance to review it.

Finally, we briefly address Metropolitan Nashville's argument that the district court erred in finding that its appeal to this Court divested the district court of jurisdiction to hear its Rule 60(b) motion to dissolve the permanent injunction. The filing of an appeal with this Court generally divests a district court of jurisdiction over the case. *See First Nat'l Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343, 345 (6th Cir. 1976). In the district court's discretion, however, it may enter an order stating that it is disposed to grant a Rule 60(b) motion, which would allow the requesting party to move this Court to remand the case, thereby once again vesting jurisdiction in the district court. *See id.* at 346. Nonetheless, Metropolitan Nashville concedes that the district court is under no obligation to issue such an order, and in fact characterized this appeal as a "procedural misstep" at oral argument. We agree. The district court did not abuse its discretion in refusing to rule on Metropolitan Nashville's Rule 60(b) motion following Metropolitan Nashville's appeal to this Court.

IV.

For the foregoing reasons, we AFFIRM the district court's finding that the definition of "sexually oriented" is unconstitutional under the First Amendment. We further AFFIRM the district court's finding that the definitions of "sexually oriented business/establishment" and "sexually oriented theater," and the no touch/buffer zone provision satisfy the First Amendment. Finally, we AFFIRM the district court's refusal to hear Metropolitan Nashville's Rule 60(b) motion. We REVERSE, however, the district court's finding that the civil disabilities provision, the disclosure provision, and the fee amounts are unconstitutional. We further REVERSE the district court's finding that the Ordinance's judicial review procedures satisfy the First Amendment. Upon remand, the district court should maintain the injunction until Metropolitan Nashville satisfies it that the constitutional problems with the Ordinance's definition of "sexually oriented" and its judicial review procedures have been corrected.

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**CONCURRING IN PART, DISSENTING IN PART**

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HARRY W. WELLFORD, Circuit Judge, concurring in part and dissenting in part.

I concur in the Chief Judge's opinion in this difficult case in most respects. I write separately to set out my views with respect to part II.F dealing with standing and prompt judicial review. The majority found that prompt judicial review is "required by *Freedman* [*v. Maryland*, 380 U.S. 51 (1965)]." *Supra* at 26. *Freedman*, however, involves a very different set of circumstances from the present controversy, because that case presented a First Amendment challenge to the "Maryland

motion picture censorship statute."[1] *Id.* at 52. The Supreme Court pointed out that under the Maryland law in question "there is *no* statutory provision for judicial participation in the procedure which bars a film, *nor even assurance of prompt judicial review*." *Id.* at 55 (emphasis added). Furthermore, the Court recognized the unique nature of the film industry, stating that "a censorship system for motion pictures presents *peculiar dangers* to constitutionally protected speech." *Id.* at 57 (emphasis added). Our present case, of course, does not involve freedom of speech in a film, but freedom of expression in a sexually-oriented place of business.

I. STANDING

I would not hold *Freedman* controlling on the issue of standing because of the circumstances in that case are entirely different from those in the instant controversy. This court has interpreted *Freedman* broadly to apply to similar types of cases brought by adult "entertainment" operators and performers, such as plaintiffs. For example, *G & V Lounge, Inc. v. Michigan Liquor Control Commission*, 23 F.3d 1071 (6th Cir. 1994), cited by the majority, involved "threatened revocation" of a liquor license if topless dancing were to occur at an Inkster, Michigan bar and nightclub. *G & V Lounge, Inc.*, 23 F.3d at 1073. With that scenario and the evidence of threatened and imminent action by the state of license revocation, this court held that plaintiff operator had standing to bring a First Amendment claim, citing Supreme Court authority, including *Freedman*. Standing would be present in such a situation even if no revocation had taken place.

In the instant case, however, the plaintiffs make no allegation of threatened revocation of their licenses (or actual censorship). The majority recognizes Metropolitan Nashville's argument "that the plaintiff businesses and

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[1] Indeed, in *Freedman*, the state conceded "that the picture [at issue] does not violate the statutory standards." *Freedman*, 380 U.S. at 52.

operators have no standing to challenge the license procedures because they have all been issued licenses." What it fails to recognize, however, is that no plaintiff has been threatened with revocation under the ordinance. Metropolitan Nashville concedes that "parties not yet affected by actual enforcement of the statute are allowed to challenge actions under the First Amendment." It is doubtful, however, particularly in light of *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997), that the plaintiffs, not operating under any threat of revocation, would have standing to challenge the constitutionality of procedures involved in the Ordinance at issue.

I would hold that plaintiffs have standing to challenge the substantive criteria for the issuance of licenses or permits, but do not have standing to challenge "the licensing scheme." *See DLS*, 107 F.3d at 413. In *DLS*, we reasoned that the plaintiffs lacked such standing because they "already have succeeded in obtaining a license under [the applicable ordinance]. If they are to be subject to any future threat of injury from actions by the City, that threat will arise under the materially different procedures for renewals or revocations of licenses under [different provisions]." *Id.* I am not persuaded that, in the instant case, the procedures involved for revocation are not different from the procedures required for applying for initial licenses.

I find neither *Newsom v. Norris*, 888 F.2d 371 (6th Cir. 1989), nor *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995), both cited in the majority opinion, to be particularly helpful to plaintiffs on the issue of standing. *Newsom* involved a prison setting and alleged retaliation against inmate advisors. *Dambrot* involved a university's alleged discriminatory harassment policy in a discharge situation addressing the issue of freedom of speech. Neither case involved the type of expression here involved, held repeatedly to be subject to reasonable, narrowly drawn state regulation.

*FW/PBS* is a case much more analogous to this case than *Freedman*. The city ordinance in *FW/PBS* purported to regulate businesses similar to those operated by plaintiffs in this case. Plaintiffs were permitted to raise a facial challenge to the ordinance because special inspections and certificates of occupancy were demanded of sexually-oriented businesses. Such provisions are absent from the Metropolitan Nashville ordinance.

## II. PROMPT JUDICIAL REVIEW

The Court in *Freedman* emphasized that the censorship of a film "puts an initial burden on the exhibition."[2] *Id.* Again, this is not the situation in the instant controversy. In the film censorship area, *Freedman* mandated a procedure "which must . . . assure a prompt final judicial decision." *Id.* at 59. The Supreme Court emphasized the need for prompt judicial review of film censorship laws, recognizing that in the Maryland scheme there was "*no assurance* of prompt judicial determination." *Id.* at 60 (emphasis added). Apparently, the scheme contained no provision for judicial review of film censorship, an entirely different circumstance from the instant case. Whether or not there is an adequate provision for prompt judicial review in these circumstances is a legal question and forms a basis for injunctive relief if it is wanting. The legality of prior restraints of freedom of expression in adult sexually-oriented businesses, while not illegal per se, requires the special attention of this court. *FW/PBS*, 493 U.S. at 225-26. To be constitutional, a prior restraint must place reasonable and prompt time constraints on the administrative process of issuing business licenses and permits and must

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[2] "Films differ from other forms of expression." *Freedman*, 380 U.S. at 61.

provide "expeditious judicial review" of administrative decisions. *Id.* at 227 (citing *Freedman,* 380 U.S. at 58-60).[3]

The Court in *FW/PBS* mandated that any such licensing scheme provide for the "*possibility* of prompt judicial review in the event that the license is erroneously denied." *Id.* at 228 (emphasis added). The Court also relied on the specific circumstances of that case in holding that, unlike *Freedman*, the city did not have the burden of proof once in court. *Id.* at 230. The question of prompt judicial review of the license permit action was whether there were "adequate bulwarks."[4] *Id.* Moreover, the Court in *FW/PBS* raised on its own volition the question of standing of certain plaintiffs who challenged the civil disability provision of the ordinance. *Id.* at 234-35. The Court held that there was no standing to challenge revocation on the basis of past criminal conviction or conduct where no petitioner actually demonstrated revocation of a license under the civil disability provision. *Id.* at 235.

I believe that the Ordinance at issue does meet the standards set out in *FW/PBS*, because it provides for much more than a "possibility" of prompt judicial review. Sections 6.54.04(E) and 6.54.070(D) of the ordinance specify certain procedures for obtaining relief from denial of a license or permit. First, a denial "*may be* immediately appealed to the circuit or chancery courts of Davidson County." (Emphasis added.) There is no requirement in the ordinance as to the form of relief that may be sought by the unsuccessful applicant.[5] There is no reason why an applicant may not

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[3] *FW/PBS* makes it clear that the "licensing scheme" in this type of case "does not present the grave dangers of a censorship system" that was present in *Freedman*. *FW/PBS*, 493 U.S. at 228.

[4] The authority cited for this proposition was *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1962), a book censorship case. The Rhode Island law at issue in *Sullivan* provided for no judicial review.

[5] Despite any purported argument made to the effect that appeal by writ of certiorari is the only statutory avenue of relief upon denial of an application, the ordinance speaks for itself in this regard.

pursue a declaratory judgment action or seek injunctive relief if a constitutional issue is claimed to be involved in either state or federal court because of an asserted invalid or improper denial. If the applicant, under the above sections of the ordinance, does choose to appeal by seeking a writ of certiorari, he or she is provided with a prompt record and an opportunity to challenge the procedures involved in a denial. Contrary to the Chief Judge, I believe that *State v. Johnson*, 569 S.W.2d 808 (Tenn. 1978), does support the proposition that Tennessee court would entertain a petition for a writ of certiorari from denial of an application even if the action taken were discretionary in nature.

I respectfully disagree with the statement by the majority in footnote 7, because temporary injunctive relief or mandamus could issue in a § 1983 suit against Metropolitan Nashville if an application were denied based on, for example, racial, sexual, or other illegal discriminatory animus, thus allowing the plaintiff to "speak" pending final adjudication. Furthermore, under the majority holding of *FW/PBS*, I believe that a rejected applicant has the opportunity for an adequate and expeditious judicial review based upon available remedies, as supported also by the affidavit of the Clerk of the Davidson County Chancery Court. There is a sufficient protection in such an event of denial of a meritorious application under the ordinance and the proof for prompt judicial review; in short, there is an "adequate bulwark" by judicial review available. The majority opinion states in footnote 8 that "[t]he ordinance does preserve the status quo by allowing existing businesses to continue to operate *until an adjudication on the merits* and by issuing a temporary license to new businesses if the court fails to rule within forty days of the filing of an appeal." (Emphasis added.) I agree with this interpretation of the effect of the ordinance, and this also presents an adequate and reasonable bulwark constitutionally, in my view.

In sum, I respectfully disagree that there is, in this ordinance, "lack of judicial review provision." There is not only such a provision but there is also a reasonable stay provision to protect a plaintiff pending judicial review. We are not dealing in this case with censorship, or attempted censorship, of speech, books, or films (as in *Freedman, supra*).

Finally, even if the judicial review provisions were inadequate, I would conclude that the severance provision in the ordinance is effective, and I would not agree to void enforcement of the entire ordinance because of perceived insufficient means of prompt judicial review.[6]

Accordingly, I respectfully dissent from parts of the majority decision for the reasons indicated.

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[6] A case cited as giving support to the majority view is a four-to-three decision of the court, *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), which permitted a facial challenge to a municipal ordinance regulating newspaper racks on city streets. The later case of *FW/PBS* states the principle applicable in this situation: "Limitation on the time within which the licensor must issue the license as well as the availability of prompt judicial review satisfy the 'principle that the freedoms of expression must be ringed about with adequate bulwarks.'" *FW/PBS*, 493 U.S. at 230.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deja Vu of Nashville, Inc., a Tennessee corporation, *et al.*, Plaintiffs-Appellants,

v.

The Metropolitan Government of Nashville and Davidson County, Tennessee, *et al.*, Defendants-Appellees.

Nos. 99-5071/00-5284/5288/5881

BEFORE: MARTIN, Chief Judge; WELLFORD and SUHRHEINRICH, Circuit Judges.

ORDER

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions or rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Deja Vu of Nashville, Inc., *et al.*

v.

Metropolitan Government of Nashville and Davidson County, Tennessee, *et al.*

Nos. 3-97-1066 & -1176 (Judge Higgins)

ORDER

In this action, as stated on the. record at the hearing on December 21, 1999, it appears that no further or additional relief is sought beyond that which has been granted by the preliminary injunction.[1,2]

The preliminary injunction heretofore issued is herewith made a permanent injunction.

Accordingly, the defendants are permanently enjoined from enforcing Chapter 6.54 of the Metropolitan Code.

The applications for interim attorneys' fees shall be deemed final applications for fees in favor of the prevailing parties as of the conclusion of this litigation by the entry of this order.

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[1] See memorandum and order (entered October 4, 1999; Docket Entry Nos. 188-189) granting motions for preliminary injunction.

[2] There is no claim by the plaintiffs for money damages under 42 U.S.C. § 1983. Applications for interim attorneys' fees are now pending before the Magistrate Judge.

The entry of this order shall constitute the final judgment in this action.[3]

It is so ORDERED.

/S/

Thomas A. Higgins
United States District Judge

[3] The plaintiffs' motion to show cause (filed June 15, 1999; Docket Entry No. 167) is denied in its entirety. The defendants' motion (filed July 2, 1999; Docket Entry No. 175) to strike is denied as moot. The plaintiffs' motion (filed June 15, 1999; Docket Entry No. 165) to strike is denied as moot.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Deja Vu of Nashville, Inc., *et al.*,

v.

The Metropolitan Government of Nashville and Davidson County, Tennessee, *et al.*

Nos. 3-97-1066 & -1176

MEMORANDUM

The plaintiffs in this case are adult-oriented establishments, including adult cabarets, adult bookstores, and adult video stores in Metropolitan Nashville and Davidson County, Tennessee, owners and operators of such establishments, and individual dancers who perform at such establishments. On August 19, 1997, the Council of The Metropolitan Government of Nashville and Davidson County enacted Chapter 6.54 of the Metropolitan Code, Bill No. 097-796. This Chapter, and subsequently enacted amendments to it, require "sexually oriented" businesses to obtain a license to operate and entertainers who perform in such establishments to obtain a permit.

The initial plaintiffs in this case, Deja Vu of Nashville, Inc.; Michael Rucker; Michael Butler; Meroney Entertainment, Inc.; The Pleasure Palace, Inc.; Carousel Amusement Center, Inc.; Dawn Pierce; and Elizabeth Martez,[1] filed this action on October 17, 1997, against The

[1] Mr. Jerry C. Pendergrass, The 822 Corporation, and 421 Corporation subsequently initiated their own action (No. 3-97-1176) also seeking preliminary injunction, and sought to intervene in this action.

Metropolitan Government of Nashville and Davidson County, and Emmitt Turner, Chief of Police of the Metro Police Department, in his official capacity, seeking a preliminary injunction, permanent injunction and declaratory judgment determining the constitutionality of Chapter 6.54. *See also*, motion (filed October 17, 1997; Docket Entry No. 2) for issuance of a preliminary injunction. On December 1, 1997, a hearing was held before the Honorable John T. Nixon on the motions (Docket Entry Nos. 2 and 11) for a preliminary injunction. On the basis that the ordinance did not provide the proper procedural requirements for a prior restraint of expression protected by the First Amendment, the Court enjoined the defendants from enforcing the ordinance. Memorandum and order (entered December 8, 1997, Docket Entry Nos. 22 and 23) (Nixon, J.). After the Metro Council amended the ordinance to correct the defects upon which the preliminary injunction was based, the Court dissolved the injunction. Order (entered December 3, 1998, Docket Entry No. 76) (Nixon, J.).[2]

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Motion (filed December 17, 1998; Docket Entry No. 11) to intervene and for preliminary injunction. The Court consolidated the actions, deemed the Pendergrass *et al.* motion to intervene moot, and treated the plaintiffs' motions (Docket Entry Nos. 2 and 11) jointly. Memorandum and order (entered December 8, 1997, Docket Entry Nos. 22 and 23) (Nixon, J.).

[2] On December 16, 1998, the plaintiffs filed a motion (Docket Entry No. 77) for a stay pending appeal and on December 31, 1998, filed a notice of appeal (Docket Entry No. 94). Judge Nixon recused himself and the case was reassigned to The Honorable Aleta Trauger. *See* order (Docket Entry No. 97) (Nixon, J.). A hearing on the motions for stay pending appeal and for preliminary injunction was held on January 13, 1999, and the motion for stay was denied. Order (entered January 26, 1999; Docket Entry No. 114) (Trauger, J.). The motions (Docket Entry Nos. 81 and 83) for preliminary injunction were set for further hearing on January 27, 1999. Order (entered January 26, 1999; Docket Entry No. 115) (Trauger, J.). By order (Docket Entry No. 109) entered January 20, 1999, the Pendergrass *et al.* motion (filed December 16, 1998; Docket Entry No. 80) to file an amended complaint was granted, and the amended complaint (Docket Entry No. 121) was filed January 20, 1999.

The plaintiffs' second motion (filed December 17, 1998; Docket Entry No. 83) for preliminary injunction, which is now before the Court,[3,4] is based on claims previously reserved by the plaintiffs. *See* plaintiffs' motion (Docket Entry No. 2) for preliminary injunction.[5] In their second motion, the plaintiffs contend that, both facially and as applied, Chapter 6.54 violates the First and Fourteenth Amendments to United States Constitution. The plaintiffs also assert that the defendants are collaterally estopped from relitigating the constitutionality of some provisions of the ordinance which were present in a predecessor ordinance to Chapter 6.54, and which the Court found unconstitutional in

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[3] By order (Docket Entry No. 122) entered February 3, 1999, Judge Trauger recused herself and the case was reassigned to Judge Nixon. By order (Docket Entry No. 124) entered February 18, 1999, Judge Nixon returned the case to the clerk for reassignment. The case was assigned to this Court.

[4] Also before the Court is the plaintiffs' memorandum (filed December 17, 1998; Docket Entry No. 84) in support; the motion (filed December 17, 1998; Docket Entry No. 81) of Jerry Pendergrass and The 822 Corporation for preliminary injunction and their memorandum (Docket Entry No. 82) in support; the plaintiffs' supplemental brief (filed December 31, 1998; Docket Entry No. 96) in support of their second motion for preliminary injunction; the defendants' memorandum (filed January 8, 1999; Docket Entry No. 104) in opposition; the plaintiffs' reply (filed January 22, 1999; Docket Entry No. 111); the defendants' response (filed January 22, 1999; Docket Entry No. 112); and the response (filed January 22, 1999; Docket Entry No. 113) of Jerry C. Pendergrass, The 822 Corporation and 421 Corporation.

[5] Also before the Court is the defendants' notice of filing (filed June 7, 1999; Docket Entry No. 157) with attached letters dated May 26, 1999, from the Sexually Oriented Business Licensing Board, informing Metro News c/o Jerry Pendergrass; Madam X c/o C.L. Steele; Purple Onion II c/o C.L. Steele; Purple Onion I c/o C.L. Steele; Ken's Gold Club c/o Ken Meroney; and Mr. Mike Rucker c/o Deja Vu; that their applications for sexually oriented business licenses have been approved; the plaintiffs' motion (filed June 15, 1999; Docket Entry No. 165) to strike defendants' notice of filing; their brief (Docket Entry No. 166) in support; and the defendants' response (filed June 28, 1999; Docket Entry No. 174).

*Ellwest Stereo Theater v. Boner*, 718 F. Supp. 1553 (M.D. Tenn. 1989) (Higgins, J.). In their motion (Docket Entry No. 81) Mr. Pendergrass and The 822 Corporation reassert their earlier claim that the civil disabilities provision of the ordinance are unconstitutional. *See* motion (Docket Entry No. 81) for preliminary injunction and memorandum (Docket Entry No. 82) in support. Accordingly, the plaintiffs seek declaratory relief in the form of a preliminary injunction under Fed. R. Civ. P. 57 and 28 U.S.C. §§ 2201 and 2202.

The Court has jurisdiction over this matter under 42 U.S.C. § 1983, 28 U.S. C. §§ 1331, 1334(3) and §§ 2201 and 2202. The motions were heard on oral testimony from April 13 to April 16, 1999. For the reasons set forth below, the plaintiffs' motions for preliminary injunction shall be granted.

I.

The Court must consider the following four factors in determining whether or not to grant a preliminary injunction:

> (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest.

*Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (quoting *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 653 (6th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996)). The general rule with respect to these factors is that courts are not to give greater weight to any one factor in particular, but are to balance them. *Id.*

When a preliminary injunction is sought because rights guaranteed by the First Amendment are potentially at stake, the first factor, likelihood of success on the merits, will be determinative. *Id.* The Supreme Court of the United States has stated that "'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes

irreparable injury.'" *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality) and *citing Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) for the proposition that "even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."). Therefore, "to the extent that [a party] can establish a substantial likelihood of success on the merits of its First Amendment claim, it also has established the possibility of irreparable harm as a result of the deprivation of the claimed free speech rights." *Id.* (citation omitted). Additionally, because "'it is always in the public interest to prevent the violation of a party's constitutional rights,'" harm to the public interest is also established by showing a substantial likelihood of success on the merits. *Id.* (quoting *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)).

II.

Sexually explicit, non-obscene performances and materials are expressions protected by the First Amendment to the United States Constitution. *Young v. American Mini Theatres Inc.*, 427 U.S. 50, 70 (1976). However, society is considered to have less interest in protecting this kind of expression than in protecting other kinds of speech. *Id.* Consequently, sexually explicit expression falls within the "outer perimeters of the First Amendment." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991); *see also, Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 438 (6th Cir. 1998). Accordingly, the type of expression which Chapter 6.54 of the Metropolitan Code seeks to regulate is on the "outer perimeters" of expression protected by the First Amendment. *Id.*

Under the due process requirement of the Fourteenth Amendment to the United States Constitution, laws must clearly define the conduct they proscribe. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The vagueness of laws

that attempt to regulate speech raises "special concerns under the Federal Constitution's First Amendment because of the obvious chilling effect of such regulations on free speech." *Reno v. ACLU*, 521 U.S. 844, 845 (1997). Such laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*, 408 U.S. at 108. This requirement was explained as follows:

> [v]ague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant danger of arbitrary and discriminatory application. Third, but related, where a vague statute "abut [s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

*Id.* (footnotes omitted).

In determining whether an ordinance is impermissibly vague, the Court "'must extrapolate its allowable meaning'" while keeping in mind the prohibition on federal courts from construing state statutes. *Id.*, 408 U.S. at 110 (quoting *Garner v. Louisiana*, 368 U.S. 157, 174 (1961)). In doing so, the Court is "' relegated . . . to the words of the ordinance itself,' to the interpretations [other courts] have given to analogous statutes, and, perhaps to some degree, to the interpretation of

the statute given by those charged with enforcing it." *Id.* (quoting *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971)).

A law will be considered impermissibly vague if it "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926). However, if the meaning of the law is commonly understood, it will not be considered vague. *See United States v J T Haun*, 90 F.3d 1096, 1101 (6th Cir. 1996). Additionally, the prohibited conduct need not be defined with mathematical precision. *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1108 (6th Cir. 1995). Nor is a law vague because it "'requires a person to conform his conduct to an imprecise but comprehensible normative standard.'" *Id.* (quoting *United States v. Angiulo*, 897 F.2d 1169, 1179 (1st Cir.), *cert. denied*, 498 U.S. 845 (1990)).

In addition, laws which are overbroad, threatening the exercise of First Amendment rights, are unconstitutional. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). Recognizing that the application of the overbreath doctrine is "'strong medicine,'" the Supreme Court has "employed it with hesitation and then 'only as a last resort.'" *New York v. Ferber*, 458 U.S. 747, 769 (1982) (quoting *Broadrick*, 413 U.S. at 613).

Moreover, the overbreath must be substantial when the protected expression involves conduct and not speech only. Id., 458 U.S. at 770 (citing *Broadrick*, 413 U.S. at 615). Accordingly, a regulation should not be invalidated for overbreath if it marginally infringes on First Amendment freedoms. Id., 458 U.S. at 770 n.25. A law is substantially overbroad if it "reaches a substantial number of impermissible applications," *Ferber*, 458 U.S. at 771, "judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. Additionally, laws are unconstitutional if they impose

restrictions so broad they cause concern over violating the law thereby, creating a "chilling effect" that curtails the availability of non-obscene expression. *Smith v. California*, 361 U.S. 147 (1959); *see also*, *Bantam Books v. Sullivan*, 372 U.S. 58 (1962).

A facial challenge can be raised on behalf of others under an exception to the ordinary standing requirements on the basis that a law is substantially overbroad. *Regan v. Time*, 468 U.S. 641, 650 (1984). To prevail on such an attack, the plaintiff must establish that there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.'" *New York State Club Assn. v. New York City*, 487 U.S. 1, 11 (1988) (quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984)).

Due to concerns of federalism that arise when a federal court reviews the constitutionality of a state regulation that is challenged as unconstitutionally vague or overbroad, the reviewing court may not supply a limiting construction in order to save the regulation from being unconstitutional. *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 136 (6th Cir. 1994) (citing *Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6th Cir. 1991) for the proposition that "federal 'courts do not rewrite statutes to create constitutionality.'").

Under our First Amendment jurisprudence, protected expressions may be subject to "reasonable time, place or manner" restrictions. *Barnes*, 501 U.S. at 566 (1991)(citing *Clark v Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Such a regulation is valid if:

> 1. If it is within the constitutional power of the government;
>
> 2. If it furthers an important or substantial governmental interest;
>
> 3. If the government interest is unrelated to the suppression of free expression; and

> 4. If the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[6]

*Id.*, 501 U.S. at 567 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). The United States Court of Appeals for the Sixth Circuit and other courts have applied this test when reviewing the constitutionality of laws regulating sexually oriented businesses. *See DLS, Inc. v City of Chattanooga*, 107 F.3d 403, 410 (6th Cir. 1997); *Ellwest*, 718 F. Supp. at 1562; *Genusa v. City of Peoria*, 619 F.2d. 1203 (7th Cir. 1980).

III.

The plaintiffs do not contest that The Metro government has the constitutional power to enact Chapter 6.54. The plaintiffs contend that Chapter 6.54 is invalid under the second element of the *O'Brien* test because it does not further an important or substantial governmental interest.

The preamble to Chapter 6.54 states that the purpose of the ordinance is "to promote the health, safety, morals and general welfare of the citizens of Metropolitan Nashville Davidson County." Plaintiffs' exhibit 6. In *Barnes*, the United States Supreme Court upheld Indiana's public indecency statute which was "designed to protect morals and public order," stating that "[t]he traditional police powers of the States is defined as the authority to provide for the public health, safety, and morals and we have upheld such as a basis for legislation." *Barnes*, 501 U.S. at 569. Moreover, a "city's interest in attempting to preserve the quality of urban life is

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[6] In *Clark*, the Supreme Court noted that the four part *O'Brien* test for reviewing the constitutionality of regulations of expressive conduct is really the same test as that for time, place, or manner regulations. *Clark*, 468 U.S. at 298. This test asks whether the law is content neutral, is "designed to serve a substantial government interest, and allows alternative avenues of communication." *Richland Bookmart*, 137 F.3d at 440.

one that must be accorded the highest respect." *American Mini Theatres*, 427 U.S. at 71.

The evidence reflects that when considering Chapter 6.54, the Metro Council reviewed relevant information and studies from other cities and states evaluating the problems caused by the presence of adult entertainment establishments. *See* notice (filed April 12, 1999; Docket Entry No. 147).[7] Specifically, the Metro Council relied on studies from Minnesota, Phoenix, Tucson, Arizona, and Austin, Texas. These studies indicated that the secondary effects of adult entertainment establishments threaten the health, safety, and welfare of the citizens where they are located. *Id.*

The Metro Council also relied on information collected in Nashville, including: (1) a report from the Metro Police Department stating that undercover officers observed substantial physical contact between dancers in adult entertainment establishments and the patrons of these establishments and that the undercover officers were successful in soliciting prostitution from several women at various establishments; (2) a report from the Metropolitan Health Department of Nashville and Davidson County of an inspection of ten adult entertainment establishments on April 16 and 17, 1997, which stated that "the presence of fresh suspected body fluid was evident in six of the ten establishments inspected;" and (3) a Metropolitan Police Department Intelligence Division Report showing that between January 1, 1996, and January 31, 1997, there were 924 dispatched calls[8] to 36 adult entertainment

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[7] A city may rely on studies and experiences of other cities in determining whether a regulation furthers a substantial governmental interest. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986).

[8] These calls included: 30 drunk calls, 189 police assistance calls, 143 disorderly calls, 27 vehicle accident calls, 95 theft calls, 45 robbery calls, 24 weapons calls, 32 fighting calls, 64 burglary alarm calls, and 33 tavern check calls. Notice (Docket Entry No. 147) at tab 3.

establishments, of which, 682 required police assistance and involved possible violations of laws or ordinances. *Id.* at tab 3.

In light of these studies and reports, the Metro Council set forth in the preamble to Chapter 6.54 the findings that: (1) sex acts are a regular occurrence at adult entertainment establishments in Davidson County, especially were there are private or semi-private booths for viewing films or live sex shows; (2) that certain employees of adult entertainment establishments engage in higher incidents of unlawful activities than others; (3) that the sex acts and resulting unsanitary conditions occurring at some adult entertainment establishments are the result of the failure of the management of those establishments to regulate activities within those establishments; and (4) that other illegal or unhealthy activities occur as a consequence of these conditions. *See* plaintiffs' exhibit 6. The findings also include the statistics on the number of cases of sexually transmitted diseases, including acquired immuno-deficiency syndrome (AIDS), gonorrhea, and syphilis in Tennessee and Davidson County. *Id.*

Based on the information relied upon by the Metro Council in promulgating Chapter 6.54, and its resulting findings as stated in the preamble, the Court finds that the Metro Council's purpose in enacting Chapter 6.54 was "to promote the health, safety, morals and general welfare of the citizens of Metropolitan Nashville Davidson County" by reducing the spread of diseases which thrive in the conditions created by unregulated adult entertainment establishments and to combat the illegal activity that occurs within and around such establishments. Plaintiffs exhibit 6. Accordingly, the Court finds that the ordinance was promulgated to further an important and substantial governmental interest.

The plaintiffs further contend that Chapter 6.54 is invalid under the third element of the *O'Brien* test because it is a

content-specific regulation, aimed at suppressing free expression.

The Court agrees that the regulation pertains exclusively to sexually explicit expression. However, because Chapter 6.54 is focused on the secondary effects of the expression, it will be treated as a content-neutral time, place, or manner regulation.[9] *Richland Bookmart*, 137 F.3d at 439-40. Therefore, the third element of the *O'Brien* test has been met.

The plaintiffs also contend that various portions of the ordinance do not satisfy the fourth element of the *O'Brien* test. The requirement that a regulation must be narrowly tailored to serve the government's interest does not require that the regulation be the "least restrictive or least intrusive means of doing so." *Ward v Rock Against Racism*, 491 U.S. 781, 798 (1989). Instead, a time, place, or manner regulation is narrowly tailored "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest." *Id.*, 491 U.S. at 800.

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[9] In *Richland Bookmart*, 137 F.3d at 439-40, the Sixth Circuit found that a regulation which focused exclusively on sexually explicit speech was content-specific on its face. However, the Court explained that although content-specific regulations are generally presumed to be unconstitutional and are subject to strict scrutiny, the Supreme Court has created a legal fiction under which regulations of erotic or sexually explicit expression are treated as if they are content-neutral providing that the regulation is really aimed at the secondary effects of the speech, rather than at the speech itself. *Id.* at 440 (*citing City of Renton*, 475 U.S. at 49, and *American Mini Theatres*, 427 U.S. at 70). The Supreme Court explained that regulations focusing on sexually explicit expression may be treated differently than regulations of other expression because the interest in protecting sexually explicit speech is marginal. *American Mini Theatres*, 427 U.S. at 72.

A. Civil Disabilities Provision[10]

The plaintiffs contend that the civil disabilities provision of Chapter 6.54 is not narrowly tailored to serve the government's interest. They also contend that the defendants are collaterally estopped from relitigating the constitutionality of the civil disabilities provision based on the Court's decision in *Ellwest*, 418 F. Supp. at 1568, that the civil disabilities provision in the predecessor ordinance was not narrowly tailored to serve the government's interest. The plaintiffs also challenge the civil disabilities provision as an impermissible prior restraint on their First Amendment rights.

The ordinance requires that sexually oriented corporations, corporate stockholders holding a majority share of stock who will be involved in the day to day operation of the business, officers, and directors be licensed. Plaintiffs' exhibit 5 at §§ 6.54.040(A)(1)&(4). Individual entertainers must also obtain a permit. Chapter 6.54.060(A).

Under the civil disabilities provision of the ordinance, no individual applicant for a license or permit who has had a misdemeanor conviction for a crime of a sexual nature[11] may

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[10] The parties refer to these provisions as the criminal disabilities provisions but in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990), the Supreme Court refers to a similar provision as the civil disabilities provision. The Supreme Court did not reach the merits of the plaintiff's challenge to the civil disabilities provision in *FW/ PBS* because the Court found that the plaintiffs did not have standing to challenge the provision. *Id.*, 493 U.S. at 233.

[11] Chapter 6.54.010(C) defines "crimes of a sexual nature" as:

> the crimes of rape, aggravated rape, aggravated sexual assault, public indecency, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or crimes committed in a jurisdiction other than Tennessee which, if committed in this state, would have constituted the crimes listed above. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the

receive a license or permit for two years following the date of the conviction and no applicant who has had a felony conviction for a crime of a sexual nature may receive a license or permit for five years following the date of the conviction. *Id.* at §§6.54.050(B)(2) and 6.54.080(A)(2).

1. standing

That "[t]he federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional) doctrines.'" *FW/PBS*, 493 U.S. at 231 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)). The party seeking to exercise jurisdiction must "'clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.'" *Id.*, 493 U.S. at 231 (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). A party asserting standing must prove:

> (1) "injury in fact," by which we mean an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct, by which we mean that the injury fairly can be traced to challenged action of the defendant, and has not resulted from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative.

*DLS*, 107 F.3d at 414 (citing *G & V Lounge*, 23 F.3d at 107).

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> elements of the offense shall be used to determine what classification the offense is given.

Plaintiffs' exhibit 5.

Accordingly, to establish standing to challenge the civil disabilities provision of the ordinance, individual plaintiffs must show that they are required to obtain a permit or license under the ordinance and that they will be unable to do so because they were convicted of a misdemeanor of a sexual nature within two years of their application, or that they were convicted of a felony of a sexual nature within five years of their application. *See FW/PBS*, 493 U.S. at 234. In order for a sexually oriented business to have standing, it must show that it will be unable to obtain a license because an individual applicant, such as a corporate director or officer who is required to be licensed in order for the business to be licensed, will be ineligible to obtain a license due to the civil disabilities provision.

Deja Vu and Mr. Michael Butler assert that they have standing to challenge the civil disabilities provision of the ordinance. As a sexually oriented business, Deja Vu is required to be licensed under Chapter 6.54. Michael Butler and Deja Vu contend that Mr. Butler is a former vice-president of Deja Vu and that if he were still a vice-president he would also be required to obtain a license.[12] The plaintiffs presented evidence that in November of 1994, Mr. Butler was convicted under the Uniform Code of Military Justice with felony statutory rape.[13] Mr. Butler's conviction was for a felony of a sexual nature and was within five years of March 15, 1999, when Chapter 6.54.030(F) would have required him to apply for a licence. Accordingly, Mr. Butler would be prohibited from obtaining a license under the civil disabilities provision of Chapter 6.54. Deja Vu argues that it also has standing because if Mr. Butler had remained a vice-president,

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[12] Mr. Butler testified that he resigned from his position at Deja Vu in November of 1998, only because of the licensing requirement.

[13] Mr. Bulter testified to this fact and also submitted an affidavit affirming it. Affidavit (filed December 17, 1998; Docket Entry No. 86) of Michael Butler.

it would have been unable to obtain a license to operate under the civil disabilities provision of the ordinance because, in order to do so, Mr. Butler would have had to be licensed.

The Court finds that because Mr. Butler is no longer employed by Deja Vu as a vice-president, he is no longer required to obtain a license as a corporate officer of Deja Vu. Additionally, Deja Vu would not be prohibited from receiving a license based on Mr. Butler's conviction. Accordingly, neither Mr. Butler nor Deja Vu have standing to challenge the constitutionality of the civil disabilities provision of the ordinance.

Mr. Pendergrass and The 822 Corporation also challenge the civil disabilities provisions of the ordinance. The plaintiffs aver that Metro News, which is owned by The 822 Corporation, is a theater and retail bookstore dealing in the display and retail sale and rental of printed and pictorial materials of an erotic and sexual nature and is, therefore, a sexually oriented bookstore required to be licensed under Chapter 6.54. Mr. Pendergrass is the sole shareholder, an officer, and a director of The 822 Corporation. Therefore, in order for The 822 Corporation to be licensed under the ordinance, Mr. Pendergrass must also be licensed. At the hearing, Mr. Pendergrass testified that he was convicted on May 22, 1997, of a misdemeanor obscenity offense in Hamilton County, Tennessee. He was required to apply for a license in Nashville by March 15, 1999, within two years of the date of that conviction. Therefore, pursuant to the civil disabilities provision of the ordinance, Mr. Pendergrass, and consequently The 822 Corporation, would be ineligible for a license. Accordingly, the Court finds that Mr. Pendergrass and The 822 Corporation have standing to challenge the civil disabilities provision of the ordinance.[14]

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[14] In their motion (Docket Entry No. 165) to strike the defendants' notice (Docket Entry No. 157), the plaintiffs' contend that the notice goes to the issue of whether the plaintiffs have standing to challenge certain aspects of

2. collateral estoppel

The plaintiffs claim that the defendants are collaterally estopped from relitigating the constitutionality of the civil disabilities provision of the ordinance based on the Court's holding in *Ellwest* that the civil disabilities provision of the predecessor ordinance was unconstitutional because it was not narrowly tailored to serve the government's interest.

The defendants assert that collateral estoppel does not apply to bar relitigation of any provisions in Chapter 6.54 because "[t]he law regulating sexually explicit expression has changed over the past ten years such that regulations that may have been unconstitutional in 1989 may be constitutional now." Defendants' memorandum (Docket Entry No. 104) at 15.

Collateral estoppel does not apply when there has been a significant change in the applicable law. *Disabled Am. Veterans v. Commissioner of Internal Revenue*, 942 F.2d 309, 313 (6th Cir. 1991); *see also, Steen v. John Handcock Mut. Life Ins. Co*, 106 F.3d 904, 913 (9th Cir. 1997). The Supreme

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the licensing provisions in Chapter 6.54 in their second motions (Docket Entry Nos. 81 and 83) for preliminary injunction. They argue that their motion to strike should be granted because at the end of the hearing on the plaintiffs' motions, the Court stated:

> this is the evidentiary record on the application for preliminary injunction and when we close here today this is going to constitute the record.

Plaintiff's brief (Docket Entry No. 166) in support at 2.

Accordingly, the Court finds that the record for the motions (Docket Entry Nos. 81 and 83) for second preliminary injunction was closed at the end of the evidentiary hearing on April 15, 1999. As the defendants have not been granted leave to file additional materials, the Court shall grant the plaintiffs' motion (Docket Entry No. 165) to strike insofar as the notice relates to the plaintiffs' motions (Docket Entry Nos. 81 and 83). Accordingly, the defendants' notice will not be considered evidence in support of, or in opposition to, the plaintiffs' second motions for preliminary injunction. However, the plaintiffs' motion (Docket Entry No. 165) to strike shall be denied in all other respects.

Court has found that such a change may occur when there is a "'judicial declaration intervening between the two proceedings . . . a modification or growth in legal principles as enunciated in intervening decisions of this Court . . . [or] an interposed alteration in the pertinent statutory provisions.'" *Disabled Am. Veterans*, 942 F.2d at 313 (quoting *Sunnen v. Commissioner of Internal Revenue*, 333 U.S. 591, 600 (1948)).

The defendants have not established that there has been a sufficient change in the case law between the time the Court rendered its decision in *Ellwest* and now regarding the provisions of the ordinance that the plaintiffs contend the defendants cannot relitigate.

The defendants also argue that collateral estoppel does not apply because the precise issues raised in this case are different from those litigated in *Ellwest*. In order for litigation of an issue to be barred based on collateral estoppel, "the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding." *N.A.A.C.P., Detroit Branch v. Detroit Police Officer's Assoc.*, 821 F.2d 329, 330 (6th Cir. 1987) (footnote omitted).[15] The defendants contend that the issues in this case are different than the issues in *Ellwest* because the purpose of the ordinance in *Ellwest* was only to protect the health of the citizens of Nashville and Davidson County, whereas the" purpose of Chapter 6.54, presently before the Court, is the broader purpose of promoting "the health, safety, morals, and general welfare of

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[15] Collateral estoppel also requires that a "determination of the issue must have been necessary to the outcome of the prior proceeding; that the prior proceeding must have resulted in a final judgment on the merits; and that the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issues in the prior proceeding." *N.A.A.C.P., Detroit Branch*, 821 F.2d at 330.

the citizens of Metropolitan Nashville Davidson County." Defendants' memorandum (Docket Entry No. 104) at 17.

The record reflects that the first paragraph of the ordinance under consideration in *Ellwest* states that the purpose of the ordinance is to protect and promote the "general welfare, health, and safety" of Nashville's citizens. Plaintiffs' reply (filed January 22, 1999; Docket Entry No. 111) to defendants' memorandum of law in opposition. Accordingly, the purpose of Chapter 6.54 is broader only insofar as it also states that its purpose is to protect the morals of the citizens of Nashville.

The Court finds that the fact that the government added that the purpose of the ordinance is to protect the morals of the citizens is not sufficient to change the issue of the constitutionality of the ordinance. Accordingly, collateral estoppel is not inapplicable based on the allegedly broader purpose of Chapter 6.54.

With respect to the civil disabilities provision in particular, the defendants assert that collateral estoppel does not apply because the issue with respect to the constitutionality of the civil disabilities provision in this case is different from that in *Ellwest*. In *Ellwest*, the ordinance provided that applications for permits and licenses were to be denied if the applicant had been convicted or pleaded *nolo contendre* "to a felony or any crime involving moral turpitude, prostitution, obscenity or any crime of a sexual nature in any jurisdiction within the five (5) years immediately preceding the date of the application." *Ellwest*, 718 F. Supp. at 1568 (quoting Section 5(a)(1)(ii) of Metropolitan ordinance (Bill No. 086-1549)).[16] In contrast, Chapters 6.54.050(B)(2) and

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[16] This provision was found to be unconstitutional because it was not narrowly tailored to serve the government's interest in denying applications to those who were likely to operate their business in contravention of the ordinance. *Ellwest*, 718 F. Supp. at 1568. The Court reasoned that if the disclosure requirement had been limited to "such

6.54.080(A)(2) limit the crimes for which an application may be denied to convictions of felonies or misdemeanors for crimes of a sexual nature. Plaintiffs' exhibit 5. Accordingly, the Court finds that the precise issue in this case was not litigated in *Ellwest* and that the defendants are not collaterally estopped from litigating the constitutionality of the civil disabilities provision in Chapter 6.54. *N.A.A.C.P., Detroit Branch*, 821 F.2d at 330.

3. prior restraint

The plaintiffs challenge the civil disabilities provision of Chapter 6.54 as an impermissible prior restraint on protected expression. They argue that the government cannot preclude a person or his employer from obtaining a license or permit to engage in constitutionally protected expression based on the fact that the person was previously convicted of obscenity.

Although laws may validly prohibit certain types of expression not protected by the First Amendment, a prior restraint on the exercise of First Amendment rights is "the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539, 559 (1975). Accordingly, "'*[a]ny* system of prior restraints of expression [bears] a heavy presumption against its constitutional validity.'" *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 317 (1980) (quoting *Bantam Books*, 372 U.S. at 70 (emphasis in original) (citations omitted)). Prior restraints against expression protected by the First Amendment are disfavored because "[i]t is difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Vance*, 445 U.S. at 315 n.13 (citations omitted).

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crimes as prostitution," rather than to any felony, there may have been a "reasonable inference that the applicant would be more likely to operate an adult-oriented establishment in contravention of the ordinance." *Id.*

In *City of Paducah v Investment Entertainment*, 791 F.2d 463 (6th Cir. 1986), *cert. denied*, 479 U.S. 915 (1986), the Sixth Circuit considered the constitutionality of a nuisance abatement law which required the business license of distributors and exhibitors of adult oriented materials to be revoked if it was judicially determined that they had distributed obscene materials. The Court found that if:

> the abatement procedure focuses on regulating the future speech of a defendant who has been adjudged "guilty" of distributing obscene material, the law is tantamount to a licensing statute establishing a prior restraint of the defendant's first amendment right to engage in nonobscene expression. To use the language of *Near v. Minnesota*, a nuisance abatement procedure applied to obscenity should be upheld if "[t]he object of the [procedure] is punishment, in the ordinary sense, [rather than] suppression of the offending [business]" and if the procedure does not "operat[e] to . . . put the publisher under an effective censorship." 283 U.S. at 709-12.

*City of Paducah*, 791 F.2d at 469. The Court went on to find that the ordinance was an impermissible prior restraint because it went "beyond merely deterring or punishing individuals who deal in obscene materials . . . to control [their] future expression." *Id.* at 470.

The Sixth Circuit further noted that the Supreme Court has permitted prior restraints provided that the following procedural safeguards are in place to prevent the prior restraints from causing censorship:

> the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only

> for a specified brief period of time and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured.

*Id.* (quoting *Southeastern Promotions. Ltd. v. Conrad*, 402 U.S. 546, 560 (1975)).

In *City of Paducah*, the Sixth Circuit found that there were adequate safeguards within Paducah's nuisance abatement ordinance. *Id.* Nevertheless, the Court found that the ordinance was unconstitutional because it "would still operate as a prior restraint on plaintiff's future distribution of non-obscene materials." *Id.*

Based on the Sixth Circuit's conclusion in *City of Paducah*, the Court finds that, because Chapter 6.54 requires the sexually oriented licensing board to deny applicants a license or permit based on a prior conviction of obscenity, the civil disabilities provision of the ordinance is an unconstitutional prior restraint. Accordingly, the Court finds that there is a substantial likelihood that the plaintiffs will succeed on the merits of their challenge to the civil disabilities provision of the ordinance.[17]

The defendants cite *Ino Ino, Inc. v. City of Bellevue*, 937 P.2d 154 (Wash. 1997), and *DLS*, 107 F.3d 403 (6th Cir. 1997), in support of the constitutionality of the civil disabilities provision. However, the Court finds that these cases do not support the constitutionality of the civil disabilities provision in Chapter 6.54.

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[17] In *Ellwest*, this Court noted that "the practice of denying a person a license to engage in activities protected by the First Amendment based on prior convictions is constitutionally suspect. In particular, the courts have consistently struck down ordinances which permit or require the denial or revocation of a license to show adult-oriented motion pictures on the basis that an applicant or an employee of an applicant has been convicted of obscenity." *Ellwest*, 718 F. Supp. at 1572 n.5 (citations omitted).

In *Ino Ino*, the plaintiffs challenged a similar civil disabilities provision only as a violation of the applicant's right to privacy. *Ino Ino*, 937 P.2d at 167-68. Accordingly, the Court does not find the decision in *Ino Ino* to uphold the civil disabilities provision in that case to be instructive. In *DLS*, the Sixth Circuit upheld a similar civil disabilities provision in a Chattanooga ordinance regulating sexually oriented businesses. The civil disabilities provision in that case prohibited an applicant from receiving a license or permit if the applicant had been convicted of or pleaded *nolo contendre* to "a felony or any crime involving moral turpitude, prostitution, obscenity, or other crime of a sexual nature." *DLS*, 107 F.3d at 414. The plaintiffs "only argument" against the civil disabilities provision of the Chattanooga ordinance was "the fact that they were not enforced against the productions of *Hair* or *Oh! Calcutta!* demonstrates that they vest the City with unbridled discretion to award or deny licenses or permits." *Id.* Accordingly, the Sixth Circuit did not address whether it was permissible to deny a person a license to engage in expression protected by the First Amendment because they had a previous conviction for obscenity. Therefore, the Court does not find the Sixth Circuit's decision to uphold the civil disabilities provision in that case to be determinative on the facts in this litigation.

B. Disclosure of Personal Information

The plaintiffs next challenge the provisions of Chapter 6.54 requiring that applicants disclose certain personal information. The plaintiffs challenge the requirement in Chapter 6.54.040(A)(5)(c) and 6.54.070(A)(4)(c) that applicants disclose their residential addresses for the past three years, the requirements in Chapter 6.54.040(A)(5)(g) and 6.54.070(A)(4)(g) that applicants submit their fingerprints and two portrait photographs, and the requirement in Chapter 6.54.070(A)(4)(d) that applicants disclose their "height, weight, color of eyes, and hair." Plaintiffs' exhibit 5.

The government contends, and the ordinance states, that applicants are required to comply with these provisions "for the purpose of facilitating the police investigation into the applicant's criminal background." Plaintiffs' exhibit 5, Chapter 6.54.040(A)(5)(c)&(g), 6.54.070(A)(4)(c),(g)&(d).

In light of the fact that the Court has found the plaintiffs are likely to be successful on their challenge to the civil disabilities provision of the ordinance, the Court further finds that it is also likely that the plaintiffs will be successful on their challenge to the disclosure requirements, as the only purpose for their inclusion in the ordinance is to facilitate the civil disabilities provision.[18]

C. Fee Requirements

Chapter 6.54.090 imposes a $500 fee on applications for a license and a $100 fee for applications for a permit. The plaintiffs challenge the constitutionality of these fees by asserting that they are excessive and are unconstitutional insofar as they are imposed to facilitate portions of the application process the Court has concluded will likely be found unconstitutional. The defendants contend that the fees are narrowly tailored to facilitate the administration of the ordinance and are, therefore, not excessive.

It is well established that the government may not tax the exercise of a constitutionally protected right. *Northeast Ohio Coalition for the Homeless v City of Cleveland*, 105 F.3d 1107, 1109 (6th Cir. 1997). However, "an ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred in furtherance of a

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[18] Moreover, at the hearing on the plaintiffs' motions, Captain Judith D. Bawcum, an officer with the Metropolitan Police Department, testified that in order to run a criminal background check, the police use the person's name and date of birth, and that they sometimes also use a fingerprint if the person goes to the police station.

legitimate state interest." *Id.* at 1109-1110. Such a fee is not excessive, even if it is more than nominal, so long as it is "'reasonably related to the expenses incident to the administration of the ordinance.'" *Id.* at 1110 (quoting *Stonewall Union v City of Columbus*, 931 F.2d 1130, 1136 (6th Cir. 1991)).

The deposition testimony of Mr. Terry Cobb, Director of the Codes Department of Metropolitan Nashville Davidson County, established that the direct costs of processing permits for entertainers is $43, which includes: (1) $24 for the criminal background check; (2) $9 for fingerprinting; and (3) $10 for a photo identification. Brief (Docket Entry No. 84) in support of plaintiffs' second motion for preliminary injunction, attachment, exhibit W at 24-25. The direct costs of processing individual license applications is $33, which includes: (1) $24 for the criminal background check; and (2) $9 for fingerprinting. *Id.*

In light of the fact that the Court has found that the civil disabilities provision of Chapter 6.54 is likely to be found unconstitutional, the Court further finds that, insofar as the fees charged under Chapter 6.54.090 are for the administration of the civil disabilities provision, there is a substantial likelihood that the plaintiffs will also succeed on their challenge of the fee provision.

D. Three-Foot Buffer Zone

Chapter 6.54.140(C) also provides that "[a]ll performances . . . shall only occur upon a stage at least eighteen inches above the immediate floor level and removed at least three feet from the nearest customer." Plaintiffs' exhibit 5. The plaintiffs contend that this provision violates the *O'Brien* test because it is content-specific and not narrowly tailored to serve the government's interest. The plaintiffs also contend that the buffer zone is vague because it does not indicate how three feet is to be measured. Finally, the plaintiffs contend that the buffer zone violates the First

Amendment rights of customers and entertainers to freedom of association.

1. content-neutral

In the plaintiffs' view, the distance requirement is an attempt to ban dances, such as table or couch dances, that allow entertainers to convey a message of intimacy and eroticism through their proximity to the customer. Therefore, the plaintiffs contend that the buffer zone is a content-specific regulation and should be reviewed under strict scrutiny.[19]

The Court has found that the ordinance, including the buffer zone provision, was written primarily to combat the secondary effects of adult entertainment and is not subject to strict scrutiny. *Richland Bookmart*, 137 F.3d at 439. Accordingly, the Court will treat the buffer zone as a content-neutral time, place or manner regulation.

2. narrowly tailored

The plaintiffs contend that the buffer zone is not narrowly tailored to serve the government's interest in preventing sexual contact between entertainers and patrons. The plaintiffs rely on *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997), in which the Supreme Court held that an injunction prohibiting abortion protesters from coming within 15 feet of people entering and leaving abortion clinics was unconstitutional because it "burdened more speech than

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[19] In support of their contention that distance is a central part of the expressive content of erotic dances, the plaintiffs presented the expert testimony of Dr. Judith Lynne Hanna, a cultural anthropologist who studies messages conveyed by dance. Dr. Hanna testified that proximity is an integral component of erotic dance performances and conveys a message of intimacy. In addition, dancers testified at the hearing that in order to convey the message they intend with their performances, it is often important that they be able to whisper to the customer for whom they are performing. Dancers testified that if they are required to remain three feet from a customer, their ability to convey messages through such oral communication would be impossible because the loud music in the entertainment establishment would make whispers inaudible.

necessary to serve the relevant governmental interest." *Id.*, 519 U.S. at 377. The Court's decision was based on the conclusion that, because the buffer zone floated around the people coming to and from the clinic, it would be difficult for protesters to remain in compliance with it and for courts to enforce it. *Id.*, 519 U.S. at 379. Additionally, the Court was concerned that due to the uncertainties caused by the fact that the zone floated, there was a substantial risk that more speech will be burdened than the injunction prohibits. *Id.*

*Schenck* is distinguishable from this case for several reasons. The buffer zone in this case differs from the one in *Schenck* in that the buffer zone in *Schenck* was truly a floating buffer zone which surrounded the clinic visitors as they came and went from the clinic. Chapter 6.54, however, requires that during their performances, entertainers are to remain on a stage eighteen inches above the ground and three feet from the nearest customer. Consequently, the three-foot buffer zone is fixed by the parameters of the stage, even though it may partially float around performers within those parameters.

The Court's decision in *Schenck* was also based on the conclusion that it prevented protestors from talking to clinic visitors at a normal conversational level. The plaintiffs contend that the three-foot buffer zone in this case suffers from the same problem because performers will not be able to carry on conversations with customers during performances from three feet due to the loud music in the entertainment establishments.

This problem differs from the one in *Schenck* because performers are not prevented from speaking to customers at a normal level entirely because of the three-foot distance requirement. Instead, as the plaintiffs admit, they are hampered due to the volume of the music in the entertainment establishments. The noise level is a factor completely under

the control of the entertainment establishments and has no bearing on the constitutionality of the buffer zone.[20]

Accordingly, the Court finds that the Supreme Court's decision in *Schenck* that the buffer zone violated the protestor's free speech rights is not determinative with respect to the constitutionality of the buffer zone in Chapter 6.54.

The plaintiffs also argue that the same interest may be accomplished without the buffer zone through the prohibitions on sexual contact, caressing, fondling, or touching found in Chapter 6.54.140(A) and (B). A content-neutral regulation of expression designed to combat secondary effects such as the buffer zone in this case is not invalid because there is an "imaginable alternative that might be less burdensome on speech." *Ward*, 491 U.S. at 797. Instead, if the regulation is not "substantially broader than necessary to achieve the government's interest," it will be upheld. *Id.* at 800. In *DLS*, the Sixth Circuit determined that a six-foot buffer zone between patrons and entertainers in adult entertainment establishments was narrowly tailored to serve the city's interest in preventing contact between customers and entertainers, and thereby prevent crime and disease. *DLS*, 107 F.3d at 413. Noting that the buffer zone "will not be invalid simply because a court concludes that the government's interest could be adequately served by some

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[20] *Schenck* is also distinguishable for other reasons. First, the Supreme Court determined that the "'standard time, place, and manner analysis is not sufficiently rigorous' when it comes to evaluating content neutral injunctions that restrict speech." *Schenck*, 519 U.S. at 385 (quoting *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994)). Second, the Court was concerned with political speech that "lie[s] at the heart of the First Amendment." *Schenck*, 519 U.S. at 358. Erotic expression, on the other hand, falls within the "outer parameters of the First Amendment." *Barnes*, 501 U.S. at 566. Finally, the sidewalks in *Schenck* were the "prototypical example of a traditional public forum," and adult entertainment establishments are not. *Schenck*, 519 U.S. at 358 (citations omitted).

less-speech-restrictive alternative," such as a no-touch rule, the Sixth Circuit found that the buffer zone was narrowly tailored. *Id.* at 412 (citing *Ward*, 491 U.S. at 800).

Likewise, the Court finds that even though Chapter 6.54.140(A) and (B) prohibit sexual contact, caressing, fondling and touching, the three-foot buffer zone is narrowly tailored to serve the government's interest in preventing crime and sexual contact between entertainers and patrons. Accordingly, the Court finds that the plaintiffs are not likely to succeed in their challenge to Chapter 6.54.140(C) on the basis that the buffer zone is not narrowly tailored to serve the government's interest.

3. economic impact

The plaintiffs next contend that the buffer zone is unconstitutional because of the severity of the economic impact it will have upon adult entertainment establishments. Because of this impact, the plaintiffs contend that the erotic expression is, in effect, being driven from the marketplace of ideas in violation of the First Amendment.

In *DLS*, the Sixth Circuit considered whether the economic impact of ordinances regulating adult entertainment renders such ordinances unconstitutional under the First Amendment. *DLS*, 107 F.3d at 413. The Court found that if an ordinance were to "destroy the market for adult cabarets, it might run afoul of the First Amendment, but not merely if it had adverse effects on the individual theater." *Id.* (citation omitted). Consequently, the economic impact on individual establishments does not raise First Amendment concerns. The appropriate inquiry is whether the economic impact of an ordinance in the aggregate forecloses a "reasonable opportunity" to operate an adult cabaret. *Id.* (citing *Renton*, 475 U.S. at 54).

Deja Vu presented evidence that, because of the configuration of seats and stages in its Nashville club and Ken's Gold Club, a majority of the floor space in these

establishments will not be useable for the seating of customers if the three-foot buffer zone is in effect.

The Court finds that this evidence only establishes that the ordinance will impose a hardship of an undeterminable degree upon an undeterminable number of cabarets. It does not establish that the buffer zone forecloses a reasonable opportunity to open and operate a cabaret in Nashville. The plaintiffs did not present any evidence that the ordinance will destroy the market for adult cabarets. Nor did the plaintiffs present evidence that a three-foot buffer zone had been responsible for the closing of any adult cabaret in other areas.[21]

The plaintiffs have failed to present sufficient evidence to establish that the buffer zone would foreclose reasonable opportunities to open and operate adult cabarets. Accordingly, the Court finds that the plaintiffs are not likely to succeed on the merits of their challenge to Chapter 6.54.140(C) on the basis that the economic impact of the buffer zone causes it to be unconstitutional.

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[21] At the hearing on the plaintiffs' motions (Docket Entry Nos. 81 and 83), the plaintiffs presented the testimony of Mr. Paul Bern in an attempt to establish that the application of a three-foot buffer zone would destroy the economic viability of adult cabarets in Nashville. Mr. Bern testified that the imposition of a four-foot buffer zone in adult cabarets in Washington State caused one profitable cabaret to become unprofitable. The Court finds that this testimony does not establish that Chapter 6.54 will prevent adult cabarets in Nashville from being viable. First, Mr. Bern only testified to the effect of the Washington ordinance on one cabaret. Moreover, Mr. Bern did not testify that any adult cabarets had closed in Washington. Additionally, the Washington ordinance contained other restrictions in addition to the buffer-zone, including a lighting requirement, that could have caused the negative impact on the cabaret. *See Ino Ino, Inc. v. City of Belleview*, 937 P.2d 154, 171 (Wash. 1997). Accordingly, the Court finds that this evidence does not establish a likelihood of a similar effect due to the three-foot buffer zone in Chapter 6.54.

4. freedom of association

The plaintiffs contend that when an entertainer performs for a customer, they are engaging in private or intimate association and expressive association protected by the First Amendment which will be hampered by the buffer zone. Accordingly, the plaintiffs contend that the constitutionality of the buffer zone should be reviewed under strict scrutiny.

Our First Amendment jurisprudence has recognized private or intimate association and expressive association:

> In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment -- speech, assembly, petition for the redress of grievances, and the exercise of religion.

*Dallas v. Stanglin*, 490 U.S. 19, 24 (1989) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984)). Those relationships that presuppose "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life" are protected by the First Amendment as intimate relationships. *Roberts*, 468 U.S. at 619-620. In order to determine whether a relationship may be protected under the First Amendment as intimate association, the Court may look at such factors as the number of people in the

relationship, its purpose, policies, selectivity, and congeniality, as well as other relevant characteristics. *Id.*, 468 U.S. at 620. Expressive association is protected to ensure that individuals who are pursuing the same or similar "political, social, economic, educational, religious, and cultural ends" may associate with each other. *Id.*, 468 U.S. at 622.

With respect to whether the contact between entertainers in adult cabarets and customers rises to the level of intimate association, performers entertain individuals who are willing to pay admission to the cabaret and a tip. Therefore, the association is not selective. Additionally, the customers generally view performances in the presence of all the other customers rather that in secluded areas. Therefore, even though the contact may be sexual in nature, it is not intimate. Accordingly, the Court finds that the association between entertainers and customers does not rise to the level of intimate association protected by the First Amendment.

With respect to whether the entertainment rises to the level of expressive association protected by the First Amendment, the Court finds that the entertainers and customers in adult entertainment establishments do not associate in order to pursue "political, social, economic, educational, religious, and cultural ends." *Roberts*, 468 U.S. at 622. Accordingly, the Court finds that the association between entertainers and customers does not rise to the level of expressive association protected by the First Amendment.

As the Court has determined that customers and entertainers are not engaged in either intimate or expressive association, the Court finds that the plaintiffs are not likely to succeed on the merits of their challenge to Chapter 6.54.140(C) on the basis that the buffer zone impermissibly interferes with their First Amendment right to freedom of expression.

5. vagueness

Finally, the plaintiffs contend that the buffer zone is impermissibly vague because it fails to provide any guidance as to how the three-foot distance requirement is to be measured.[22] The defendants contend that there is not a substantial likelihood that the plaintiffs will be successful in their vagueness claim because in *DLS*, 107 F.3d at 411, the Sixth Circuit upheld an ordinance establishing a similar six-foot buffer zone. The defendants further contend that the ordinance is not vague because "three feet" is a common and understandable term.

The Court finds that the Sixth Circuit's holding in *DLS* that a six-foot buffer zone was constitutional is not indicative of the plaintiffs' likelihood of success on the merits as the plaintiffs in *DLS* failed to challenge the buffer zone provision in that case as unconstitutionally vague. Based on the "words of the ordinance itself," the Court agrees that the ordinance does not provide any guidance with respect to how three feet is to be measured. *Grayned*, 408 U.S. at 110. As for "the interpretation of the [ordinance] given by those charged with enforcing it," Charles Watkins, the Sexually Oriented Business Inspector, testified during the hearing of the plaintiffs' motions that he was did not know how three feet would be measured. *Id.*

However, in determining whether a law regulating expressive activity is vague, courts do not require "perfect clarity and precise guidance." *Ward*, 491 U.S. at 794 (citing *Grayned*, 408 U.S. at 110 for the proposition that "we can never expect mathematical certainty in our language."). Although the standard for measuring three feet is

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[22] At the hearing on the plaintiffs' motions, the plaintiffs demonstrated that whether the measurement is taken from the place where the nearest customer is standing or from the place where the nearest customer could reach may determine whether the customer will be able to hand the entertainer money while she is on stage performing.

"undoubtedly flexible, and the officials implementing [it] will exercise considerable discretion," the Court finds that the buffer zone is not unconstitutionally vague. *Id.* Accordingly, the Court finds that the plaintiffs are not likely to succeed on the merits of their challenge to Chapter 6.54.140(C) on the basis that the buffer zone is impermissibly vague.

E. Prohibition Against Physical Contact

Chapter 6.54.140(C) states that "[n]o customer shall be permitted to have any physical contact with any entertainer on the licensed premises while the entertainer is engaged in a performance of live sexually oriented entertainment." Plaintiffs' exhibit 5. The plaintiffs challenge this provision as overbroad because it prohibits incidental, unintentional, benign, or non-sexual contact between customers and entertainers.

In support of this assertion, the plaintiffs cite *Threesome Entertainment v Strittmather*, 4 F. Supp. 719, 722-23 (N.D. Ohio 1988). In *Strittmather*, a similar no-touch provision was found to be unconstitutional because it lacked a mens rea requirement. However, the prohibition against touching in that case is distinguishable from the no-touch provision in Chapter 6.54 in that it provides criminal penalties.

Moreover, in order to be considered overbroad, a law must substantially threaten the exercise of First Amendment rights. *Ferber*, 458 U.S. at 770. However, even if dancers remain a greater distance from customers while performing than they might if the law prohibited only intentional touching, the increased distance will not substantially threaten the exercise of their First Amendment right by significantly changing the message of their performance. *See KEV, Inc. v. Kitsap County*, 793 F.3d 1053, 1061 (1986). Furthermore, the Court finds that performances are unlikely to be affected by the no-touch provision in light of the fact that the performers are required to remain three feet from the nearest customer while performing under the buffer zone provision in the

ordinance. Accordingly, the Court finds that there is not a substantial likelihood that the plaintiffs will be successful on their overbreath challenge of the no-touch provision in Chapter 6.54.140(C).

F. Hours of Operation

Chapter 6.54.120(A) requires that "[a]ll sexually oriented businesses shall be closed between the hours of three a.m. and eight a.m. Monday through Saturday and between the hours of three a.m. and twelve noon on Sundays." Plaintiffs' exhibit 5. The plaintiffs contend that this provision does not further a substantial government interest, and therefore, fails the second prong of the *O'Brien* test. *Barnes*, 501 U.S. at 567. The plaintiffs further contend that because this restriction only applies to businesses protected by the First Amendment, it violates the Equal Protection Clause of the Fourteenth Amendment. The defendants contend that the Court should deny the plaintiffs' motion with respect to this challenge because the same restriction was upheld by this Court in *Ellwest*, 718 F. Supp. at 1577, and a similar restriction was upheld by the Sixth Circuit in *Richland Bookmart*, 137 F.3d at 43.

The Court has found that reducing crime and the spread of sexually transmitted diseases is an important or substantial government interest. The preamble to Chapter 6.54 does not contain any information distinguishing the early morning hours from other hours with respect to the secondary effects of adult entertainment establishments. However, "[i]t is not unreasonable to believe that such regulation of hours of [adult entertainment establishments] would tend to deter prostitution" and other crimes. *Richland Bookmart*, 137 F.3d at 440-41. Moreover, adult entertainment establishments are only required to close 5 hours a day on weekdays and nine hours on Sunday. This is a minor infringement upon activity protected by the First Amendment. *Ellwest*, 718 F. Supp. at

1577. Accordingly, the Court finds that the hours of operation restriction is a valid time, place, or manner regulation.

In support of the plaintiffs' challenge under the Equal Protection Clause of the Fourteenth Amendment, the plaintiffs contend that patrons of adult entertainment establishments have a fundamental right to visit adult establishments during the hours the ordinance requires those establishments to be closed. Therefore, the plaintiffs argue that the Court should review the constitutionality of the hours of operation provision under strict scrutiny.

Heightened scrutiny is not the appropriate level of scrutiny for regulations challenged as violating the Equal Protection Clause unless a government regulation utilizes "a classification [that] warrants some form of heightened review because it jeopardizes [the] exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). If not, "the Equal Protection Clause requires only that the classification rationally further a legitimate state interest."

The Court finds that there is no fundamental interest in attending adult entertainment establishments during the hours in which the ordinance requires them to be closed. Nor does the hours of operation provision categorize patrons of adult entertainment establishments or adult entertainments on the basis of an "inherently suspect characteristic." *Id.* Accordingly, review of the hours of operation provision under heightened scrutiny is not appropriate based on the plaintiffs' challenge. The Court has found that the hours of operation provision furthers an important or substantial government interest. Therefore, the hours of operation provision is also rationally related to a legitimate' state interest. Accordingly, the Court finds that the plaintiffs are not likely to succeed on their challenges to Chapter 6.54.120(A) as an unconstitutional regulation under the First Amendment or Equal Protection Clause of the Fourteenth Amendment.

G. Definitions

1. sexually oriented

Chapter 6.54.010(X) defines "sexually oriented" as:

> any exhibition of any motion pictures, films or videos depicting "specified sexual activities" or "specified anatomical areas" or any live performance, display or dance of any type, removal of articles of clothing or appearing unclothed, pantomime, modeling, or any other personal service offered customers a significant or substantial portion of which depicts any actual or simulated performance of "specified sexual activities" or exhibition and viewing of "specified anatomical areas."[23]

Plaintiffs' exhibit 5.

The plaintiffs contend that this definition is vague and overbroad as it potentially applies to a vast range of expression and entertainment that do not cause the type of secondary effects at which the ordinance is aimed.

The Court agrees that the term "sexually oriented" is overbroad as it could apply to the exhibition of any film, video, or movie, even if it were not the type typically considered to be adult oriented, providing that it depicts "[l]ess than completely and opaquely covered" buttocks or female breasts as stated in Chapter 6.54.010(AA). Therefore, this definition does not limit sexually oriented films, videos,

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[23] Chapter 6.54.010(BB) defines "specified sexual activities" as: "(1) human genitals in a state of sexual stimulation or arousal; (2) acts of human masturbation, sexual intercourse, or sodomy; (3) fondling or erotic touching of human genitals, pubic region, buttock, or female breasts." Chapter 6.54.101(AA) defines "specified anatomical areas" as "(1) less than completely and opaquely covered: a. human genitals, pubic region, b. buttocks, c. female breasts below a point immediately above the top of the areola; and (2) human male genitals in a discernibly turgid state, even if completely opaquely covered." Plaintiffs' exhibit 5.

or movies to those which are distinguished by their emphasis on such depictions. Under this definition, PG or R-rated movies containing such depictions could also fall within the purview of the statute despite the fact that they are not the type of movies that cause the kind of secondary effects at which Chapter 6.54 is aimed. Consequently, the definition of "sexually oriented" "reaches a substantial number of impermissible applications." *Ferber*, 458 U.S. at 771. Accordingly, the Court finds that the plaintiffs are likely to succeed on their overbreath challenge to the definition of "sexually oriented" in Chapter 6.54.010(X).

2. sexually oriented bookstore and sexually oriented video store

A "sexually oriented bookstore" is defined in Chapter 6.54.010(Y)(1) as:

> an establishment having a *majority of its stock in trade or a majority of its floor space* in books, magazines, other periodicals, or any other items which are *distinguished or characterized by their emphasis* on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation of the patrons therein; or in conjunction therewith has facilities for the presentation of sexually oriented entertainment, including but not limited to sexually oriented movies, sexually oriented videos, sexually oriented films, or sexually oriented live entertainment, for observation by patrons therein.

Plaintiffs' exhibit 5. (emphasis added).

Chapter 6.54.010(Y)(4) defines sexually "oriented video store" as:

> a commercial establishment having *a majority of its stock or a majority of its floor space*

> dedicated to "sexually oriented videos," as defined in this section, which are rented or sold or presented for a fee or incidentally to another service; or in conjunction therewith, regularly presents on the premises sexually oriented motion pictures or sexually oriented films, "sexually oriented videos," or sexually oriented live exhibitions which are *distinguished or characterized by an emphasis* on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observance by patrons therein.

*Id.* (emphasis added).

The plaintiffs assert that these definitions are unconstitutionally vague because the phrase "majority of stock" and "majority of its floor space" is vague.

In *Richland Bookmart*, the Sixth Circuit considered a vagueness challenge to a regulation of sexually oriented bookstores that defined the bookstores as those having their "principal or predominant stock or trade" in sexually oriented materials, devices or paraphernalia. *Richland Bookmart*, 137 F.3d at 441. The Court rejected this challenge, finding that terms used in the definition were "understandable common terms." *Id.*

Likewise, the Court finds that the terms "majority of stock" and "majority of its floor space" are sufficiently clear to provide notice to bookstores and video stores that fall within the purview of the ordinance. Accordingly, the Court finds that the plaintiffs are not likely to succeed on their vagueness challenge to the definitions of "sexually oriented bookstore" and "sexually oriented video store."

The plaintiffs also challenge these definitions as overbroad. In order to fall under the definition of a "sexually oriented bookstore," a store must have a majority of its stock

in materials "distinguished or characterized by their emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas.'" Chapter 6.54.010(Y).

Additionally, in order to fall under the definition of a "sexually oriented video store," a store must have a majority of its stock of floor space in "sexually oriented videos." Such videos are narrowly defined in Chapter 6.54.010(Y)(4)(a) as those with a cover that depicts "specified sexual activities" or "specified anatomical areas." Accordingly, the Court finds that the plaintiffs are not likely to succeed on their claim that the definitions of "sexually oriented bookstore" and "sexually oriented video store" are overbroad.

Chapter 6.54.010(Y)(2) defines "sexually oriented nightclub" to mean:

> a theater, concert hall, auditorium, nightclub, bar, restaurant, or similar commercial establishment which *regularly* features live performances that are *characterized* by any actual or simulated performance of "specified sexual activities" or the exposure of "specified anatomical areas," as defined in this section.

Plaintiffs' exhibit 5 (emphasis added).

Chapter 6.54.010(Y)(3) defines "sexually oriented theater" to mean:

> an enclosed building *regularly* used for presenting films, motion pictures, videocassettes, slides, or other photographic reproductions or other material *depicting, describing or relating* to "specified sexual activities" or "specified anatomical areas," as defined in this section, for observation by patrons therein.

*Id.* (emphasis added).

Chapter 6.54.010(Z) defines "sexually oriented entertainment" to mean:

> the *regular* presentation, for a fee or incidentally [sic] to another service, of material or exhibitions *distinguished or characterized by an emphasis* on matter depicting or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation by patrons therein.

*Id.* (emphasis added).

The plaintiffs contend that the definitions of "sexually oriented nightclub," "sexually oriented theater," and "sexually oriented entertainment," are impermissibly vague in that there is no limitation on the scope of the interpretation of the term "regularly" featured, used, or presented.

The Court finds that there is no "real and substantial ambiguity" in the term "regular." *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1210 (5th Cir. 1982) (denying the plaintiff's vagueness challenge to a city zoning ordinance which restricted the operation of adult theaters on the basis that it was unclear what it meant to show adult films on a "regular basis"). In the case of *FW/PBS*, an ordinance regulated adult theaters and cabarets that regularly provided nudity, sexually explicit depictions, or descriptions. *FW/PBS*, 493 U.S. at 254. The plaintiffs challenged the term "regularly" as vague. Justice Scalia concluded that the term "regularly" in this context "can reasonably be interpreted to mean a continuous presentation of the sexual material as one of the very objectives of the commercial enterprise." *Id.*, (Scalia, J., concurring in part and dissenting in part). The same is true with respect to the term "regularly" as it is used in Chapter 6.54. Accordingly, the Court finds that the plaintiffs are not likely to succeed on their challenge to the terms "sexually oriented nightclub," "sexually oriented theater," and "sexually

oriented entertainment" on the basis that the term "regularly" is vague.

Further, the plaintiffs contend that as the terms "sexually oriented nightclubs," "sexually oriented entertainment" and "sexually oriented theater" are overbroad as they are defined in the ordinance. The Court finds that, because the terms "sexually oriented nightclubs" and "sexually oriented entertainment" are limited to those that have regular presentations or performances characterized or distinguished by the inclusion of "specified sexual activities" or the exposure of "specified anatomical areas," the plaintiffs are not likely to succeed on their challenge that these definitions are overbroad.

However, the definition of "sexually oriented theater" could include those theaters which regularly present films, motion pictures, and videocassettes which merely depict "specified sexual activities" or "specified anatomical areas." It does not limit the theaters to those that show films, motions pictures, and videocassettes that are distinguished or characterized by such depictions. Consequently, this definition includes a vast number of theaters which show, for instance, PG or R-rated movies containing such depictions, but which would not cause the kinds of secondary effects at which Chapter 6.54 is aimed. Therefore, the definition of "sexually oriented theater" "reaches a substantial number of impermissible applications." *Ferber*, 458 U.S. at 771. Accordingly, the plaintiffs are likely to succeed on their overbreath challenge to the definition of "sexually oriented theater" in Chapter 6.54.010(Y)(2).

H. Booth Regulation

Chapter 6.54.050 of the ordinance sets forth certain construction standards and regulatory provisions concerning any "booth" for the "viewing of any sexually oriented entertainment, including but not limited to sexually oriented films, sexually oriented movies, sexually oriented videos."

Plaintiffs' exhibit 5. The plaintiffs contend that the booth regulations are overbroad because they apply to businesses and forms of entertainment that do not cause the types of secondary effects at which Chapter 6.54 is aimed.

The term "sexually oriented video" has been narrowly defined as those that depict specified sexually activities or specified anatomical areas on its cover. Therefore, the definition of "sexually oriented video" does not reach a "substantial number of impermissible, applications." *Ferber*, 458 U.S. at 771. As set forth above, the term "sexually oriented" is substantially overbroad as it applies to films and movies. However, the plaintiffs have not established that there are a substantial number of circumstances in which films and movies to which the term "sexually oriented" impermissibly applies are shown in the types of booths that Chapter 6.54 seeks to regulate. Therefore, the plaintiffs have not established that the booth requirement is overbroad because it "reaches a substantial number of impermissible applications." *Id.* Accordingly, the Court finds that the plaintiffs are not likely to succeed on their overbreath challenge to the booth requirements in Chapter 6.54.050.

I. Revocation and Suspension Provisions

Chapter 6.54.150(A)(9) states that the board shall revoke a license if "[t]he licensee fails to maintain the licensed premises in a sanitary and safe condition by allowing continuing violations of Chapter 6.54." Plaintiffs' exhibit 5. Chapter 6.54.150(B)(1) states that the board shall either fine, suspend or fine and suspend a license if "[t]he licensee fails to maintain the licensed premises in a sanitary and safe condition by allowing a violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030." *Id.*

The plaintiffs contend that this provision is impermissibly vague because it does not provide sufficient guidance as to what constitutes a "sanitary and safe condition." The Court

finds that in order for the board to revoke, suspend, and/or fine a licensee under these sections, the licensee must be in violation of Chapter 6.54, Metropolitan Code § 7.24.030, or Tennessee Code Annotated, § 57-4-204. Because the Metropolitan Code, § 7.24.030, Tennessee Code Annotated, § 57-4-204, and Chapter 6.54, all contain standards for determining whether a business is in compliance with them, the Court finds that the plaintiffs are not likely to succeed on their challenge to Chapters 6.54.150(A)(9) and 6.54.150(B)(1) as impermissibly vague.

J. Severability

Chapter 6.54.170 states:

> Should any court of competent jurisdiction declare any section, clause or provision of this chapter to be unconstitutional, or any other ordinance of the metropolitan government unconstitutional, such decision shall affect only such section, clause, provision or ordinance so declared unconstitutional, and shall not affect any other section, clause or provision of this chapter.

Plaintiffs' exhibit 5.

When legislation contains a severance clause, "[i]t is the duty of the courts to give effect to a severability clause and to make an elision, so as not to invalidate an entire act" "unless observance thereof would frustrate the dominant legislative intent." *Moore v Fowinkle*, 512 F.2d 629, 632 (6th Cir. 1975) (citations omitted). Moreover, if severing the unconstitutional provisions of an act would cause it to be essentially meaningless, the Court should not give effect to the severability clause. *Ellwest*, 718 F. Supp. at 1581.

IV.

As set forth above, the Court finds that the plaintiffs have made the required showing of a substantial likelihood of success on the merits that numerous provisions of Chapter

6.54 are unconstitutional as violations of the First or Fourteenth Amendments to the United States Constitution. If the Court were to give effect to the severability clause, the remaining provisions would frustrate the dominant legislative intent of the ordinance. Accordingly, a preliminary injunction will issue against the defendants. The defendants shall be enjoined from enforcing Chapter 6.54, in its entirety, pending the adjudication of these cases on the merits and entry of a final judgment.

An appropriate order shall be entered.

/s/

Thomas A. Higgins
United States District Court

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Deja Vu of Nashville, Inc., *et al.*,

v.

Metropolitan Government of Nashville and Davidson County, Tennessee, *et al.*

Nos. 3-97-1066 & -1176 (Judge Higgins)

ORDER

In accordance with the memorandum contemporaneously entered, the plaintiffs' motions (filed December 17, 1998; Docket Entry Nos. 81 and 83) for a preliminary injunction are granted.[1]

Accordingly, the defendants are enjoined from enforcing Chapter 6.54 of the Metropolitan Code, pending the adjudication of these cases on the merits and entry of a final judgment.

It is so ORDERED.

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[1] The plaintiffs' motion (filed June 15, 1999; Docket Entry No. 165) to strike the defendants' notice of filing (filed June 7, 1999; Docket Entry No. 157) is granted insofar as the notice relates to the plaintiffs' second motions (Docket Entry Nos. 81 and 83) for preliminary injunction. However, the plaintiffs' motion is denied in all other respects.

/S/

Thomas A. Higgins
United States District Court

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Deja Vu of Nashville, Inc., *et al.*,

v.

The Metropolitan Government of Nashville and Davidson County, Tennessee, *et al.*

No. 3-97-1066 (Judge Higgins)

ORDER

The Court has before it the plaintiffs' renewal (filed March 25, 1999; Docket Entry No. 137) of motion for stay pending appeal and motion to vacate prior order and the defendants' response (filed March 30, 1999; Docket Entry No. 140) in opposition.

Having considered the papers in support of and in opposition to the motion, and having had the benefit of argument of counsel on March 26, 1999, the motion (Docket Entry No. 137) is denied for the reasons stated in Judge Trauger's order (Docket Entry No. 114) entered January 26, 1999, which, together with the statements on the record at the hearing on January 13, 1999, are adopted and incorporated herein as the findings and conclusions of this Court.

It is so ORDERED.

/S/
Thomas A. Higgins
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

Deja Vu of Nashville, Inc., a Tennessee Corporation, *et al.* (No. 3-97-1066), Jerry C. Pendergrass, *et al.* (No. 3-97-1176), Plaintiffs,

v.

The Metropolitan Government of Nashville and Davidson County, Tennessee, and Emmett Turner, Chief of Police, in his official capacity, Defendants.

Consolidated Cases Nos. 3-97-1066 & -1176 (Judge Trauger)

ORDER

On January 13, 1999, plaintiffs' Motion for Stay Pending Appeal (Docket no. 77) and plaintiffs' Emergency Motion (Docket no. 99) were heard by this Court. The Court noted that Judge Nixon's well-reasoned Memorandum Opinion dissolving the preliminary injunction was based on amendments to Metropolitan Code § 6.54 and amendments to Tennessee Code Annotated § 27-9-111 which cured the defects of maintaining the status quo and providing prompt judicial review. The Court, having considered the four factors courts must consider in deciding whether to grant a stay pending appeal, determines that plaintiffs have little likelihood of success on the merits of the appeal of Judge Nixon's order dissolving the injunction (Docket no. 76). For this reason, and the other reasons stated by the Court in ruling from the bench (which are incorporated into this order by reference) the stay is denied.

The Court also denies plaintiffs' Emergency Motion. However, by order entered contemporaneously herewith the Court has set a hearing on the Déjà vu Plaintiffs' Second Motion for a Preliminary Injunction (Docket no. 83) and the Pendergrass plaintiffs' Motion for a Preliminary Injunction (Docket no. 81) for January 27, 1999, at 2:00 p.m.

/S/
ALETA A. TRAUGER, U.S. DISTRICT JUDGE

APPROVED FOR ENTRY:
DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
JAMES L. MURPHY III, # 9589
DIRECTOR OF LAW

/S/
James L. Charles, #9007
Associate Director of Law
204 Metropolitan Courthouse
Nashville, TN 37201
615-862-6341

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Order has been mailed to John Herbison, 2016 Eighth Avenue South, Nashville, TN 37204, H. Louis Sirkin, 920 Fourth & Race Tower, 105 West Fourth Street, Cincinnati, Ohio 45202-2776, Michael F. Pleasants, 8 South Third, Suite 200, Memphis, TN 38103, and Bradley J. Shafer, 3800 Capital City Blvd., Suite 200, Lansing, Michigan 48906, this __ day of January, 1999.

/S/

James L. Charles

THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

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| DEJA VU OF NASHVILLE, INC., et al., | |
| v. | \| No. 3 :97-1066 |
| THE METROPOLITAN GOVERNMENT | \| Judge Nixon |
| OF NASHVILLE AND DAVIDSON | \| Magistrate |
| COUNTY, et al., | \| Judge Griffin |
| and | \| Consolidated |
| | \| Cases |
| JERRY C. PENDERGRASS, et al., | |
| v. | \| No. 3 :97-1176 |
| THE METROPOLITAN GOVERNMENT | \| Judge Nixon |
| OF NASHVILLE AND DAVIDSON | \| Magistrate |
| COUNTY, et al. | \| Judge Griffin |

**MEMORANDUM**

Pending before the Court is Defendant's Motion to Dissolve Preliminary Injunction, (Doc. No. 34), to which Plaintiffs have filed a Response, (Doc. No. 63).[1] Defendant, in turn, has filed a Reply to Plaintiffs' Response. (Doc. No. 67.) For the reasons set forth below, Defendant's motion is GRANTED and the preliminary injunction imposed in this case is hereby dissolved.

**I. Background.**

This case revolves around Defendant Metropolitan Government of Nashville and Davidson County's (hereinafter Metro) Sexually Oriented Business Ordinance ("the Ordinance"). By Order dated December 8, 1997, this Court

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[1] Plaintiffs have filed both a Response (Doc. No. 63) and a Memorandum in support of their Response (Doc. No. 64). For the sake of brevity, the Court's citations to Plaintiffs' Response shall in actuality refer to Plaintiffs' Memorandum. (Doc. No. 64.)

granted Plaintiffs' motion for a preliminary injunction based on the findings that the Ordinance as written did not sufficiently preserve the status quo, nor did it provide for sufficiently prompt judicial review. (Doc. No. 23.) Defendant has moved for the preliminary injunction to be dissolved now that the Ordinance has been amended, as has the State's writ of *certiorari* statute. (Def.'s Mem. at 2-3.) The Court held a hearing on November 5, 1998, during which time the parties had an opportunity to present evidence and argue their positions.

A. *The Enjoined Ordinance*

The Plaintiffs are a group of establishments and individuals which provide adult public entertainment in the form of live nude and/or semi-nude performance dance entertainment in a club environment. This Court enjoined a regulatory scheme enacted by the Metro Council which requires "sexually oriented businesses" to obtain licences before being permitted to operate and adult entertainers employed in these establishments to obtain permits in order to perform.[2]

The Ordinance as originally written specifically requires the operators of all "sexually oriented businesses," including bookstores, video stores, theaters, and nightclubs which "regularly present material or exhibitions distinguished or characterized by an emphasis on matter depicting . . . 'specified sexual activities' or 'specified anatomical areas'" to obtain licenses to operate issued by a specially established board ("the Board"). Tenn. Code Ann. § 6.54.010(S). The application for a license requires the operators to provide such information as addresses, employment history, criminal violations of a sexual nature or involving moral turpitude, fingerprints, citations of zoning code violations, and diagrams

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[2] Again for the sake of brevity, the Court hereinafter will refer only to licenses sought by businesses since the issues at hand apply equally to license seekers as well as permit seekers.

of booths, stalls, and cubicles. §§ 6.54.040(A)(5)-(6), 6.54.070A)(2). Operators who have been convicted or pleaded *nolo contendere* to a crime of a sexual nature or involving moral turpitude are prohibited from obtaining licenses for specified periods of time. §§ 6.54.040(C)(2)(a)-(b), 6.54.070(A)(9). Similar requirements apply for entertainers employed in these businesses. Licenses must be renewed on a yearly basis, and can be revoked for a variety of reasons, including discovery that an operator employs an entertainer who does not have a permit, or the furnishing of sexually explicit material to minors. §§ 6.54.100, 6.54.140.

Once the application is received, the Board must distribute a copy of the application "promptly" to the Police Department, the Department of Codes and Administration, the Health Department, the Fire Department, and the applicant. § 6.54.040(A)(1). These departments are required to conduct inspections and to provide reports to the Board within thirty days of receipt of the application. § 6.54.040(B)(3). The Board is then required to make its determination within twenty days of receiving these reports. § 6.54.040(C)(1). However, in certain circumstances, the Board may hold the application for an additional thirty days before issuing its initial decision. § 6.54.040(C)(7).

The enjoined Ordinance makes provisions for the appeal of unfavorable decisions. In the case of both operators and entertainers, if the license is denied, the applicant has the right to request a hearing within ten days of notification of the decision. §§ 6.54.040(E)(1), 6.54.070(D)(6). Once the request is received, the Board is required to schedule a hearing at its next meeting, during which time it hears evidence presented by the applicant and issues its final decision.[3] The denial of a license is required to be mailed within ten days to the

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[3] The Board is required to meet twice a month. § 6.54.020(D)(1). Board Policy No. 10 dictates that the Board meet on the second and fourth Tuesdays of every month.

applicant's address. §§ 6.54.040(E)(1)(e), 6.54.070(D)(6)(e). An appeal of this decision may be made directly to the Chancery Court. §§ 6.54.040(E)(2), 6.54.070(D)(7). The metropolitan government department of law may institute proceedings for a declaratory judgment. In addition, the Ordinance permits an applicant to appeal by filing a petition for writ of certiorari, in which case the Board must submit all records of the proceedings before it to the court within ten days. *Id.* The enjoined Ordinance makes similar provisions for the appeal of the denial of an entertainer's permit. However, in the case of entertainers, the board has only fifteen days to make its initial determination after receiving the reports from other agencies, although it may hold the application for an additional thirty days under specified circumstances. §§ 6.54.070(C)(1), (C)(5).

B. *The Amended Ordinance*

1. Maintenance of the Status Quo

The amended Ordinance allows currently operating businesses to appeal adverse administrative decisions within 60 days, during which time the adverse decision is stayed. Furthermore, once the appeals process is initiated, the adverse decision is further stayed until the court upholds the decision after adjudication on the merits. § 6.54.040(E)(3). If the business or entertainer forgoes appeal, they may continue to operate until the 60 day period has expired. *Id.* An identical provision applies to individual permit applications. § 6.54.070(D)(3).

2. Prompt Review

a. *Administrative Determinations*

The administrative process, as amended, will be completed in 47 days. (Def.'s Mem. at 4). Upon submission of an application for a license, the Department of Codes Administration, the Fire Department, and the Health Department will inspect the business, and the Police Department will run a criminal background check on the

applicant. § 6.54.040(B)(1). All of these departments must submit reports to the Board within 20 days of the filing of the application. *Id.* Failure to investigate or submit a timely report by any department will be construed as though the department approved the application. *Id.*

Once the Board has the reports, it must meet and deny or grant the application within 15 days. § 6.54.040(C)(1). Failure to meet or meeting without a quorum shall be treated as an approval of the application and the license will be mailed to the applicant. *Id.* If the Board meets on the 15th day and allowing one day to mail the result, the entire process will be complete in 47 days.[4] (Def.'s Mem. at 4.)

Upon denial of an application, the applicant can appeal to the Board for a full hearing or proceed to court. § 6.54.040(E)(1)-(2). The applicant has 5 days to appeal to the Board and the Board has 15 days to meet and hear the appeal. §6.54.040(E)(1)(a)-(b). An oral decision will be rendered at the hearing. § 6.54.040(E)(1)(d) Allowing one day to mail a written decision, the applicant may add an additional 21 days to the administrative process at his or her discretion.

b. *Judicial Review*

Applicants can apply for a writ of *certiorari* in order to have the final decision of the Board reviewed since a procedure for review is not otherwise provided. Tennessee Code Annotated § 27-9-111, addresses the briefing and hearing schedule used in processing writs. The section has been amended as follows:

> If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the United States Constitution, and either the

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[4] Including a potential ten day extension for additional investigation into out-of-state records, if necessary. § 6.54.040(C)(8).

> petitioner or the respondent requests an expedited hearing, *the court shall hear the matter and issue its decision within* foray *(40) days of the court granting the writ of certiorari.* When an expedited hearing is requested, the board or commission shall forward the transcript described in Tennessee Code Annotated, Section 27-9-109 within seven days of the grant of the writ of *certiorari.*

(Emphasis added.) The statute thus now requires a decision within a mandated period of time for all First Amendment cases.

**II. Discussion**

In order to determine the propriety of injunctive relief, the Court must look to the following factors: (1) the likelihood of the movant's success on the merits; (2) the irreparable harm that could result if the injunction is not issued; (3) the impact on the public interest of granting or denying the injunction; and (4) the possibility of substantial harm to others if the injunction is issued. *G & V Lounge, Inc., v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994). Sixth Circuit precedent makes it clear that these four factors are not absolute prerequisites, but must rather be balanced by the Court. *Performance Unlimited v. Questar Pubs., Inc.*, 52 F.3d 1373, 1381 (6th Cir. 1993) (citing *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)). If a party demonstrates substantial likelihood of success on the merits, the three other factors will favor the party as well. *Planned Parenthood Ass'n v. McWherter*, 716 F. Supp. 1064, 1066 (M.D. Tenn. 1980); *cf. Performance Unlimited*, 52 F.3d at 1385-86 (quoting *Merrill Lynch, Pierce, Fenner & Smith*, 836 F. Supp. 428, 432 (W.D. Mich. 1993) (citation omitted)). The Court will therefore focus its inquiry

upon the first factor, although it will also discuss the others in turn.

A. *Likelihood of Success on the Merits*

This Court enjoined the original Ordinance on two grounds: 1) the Ordinance failed to sufficiently maintain the status quo pending judicial review; and 2) the Ordinance did not provide for prompt judicial review. (Court's Mem. at 10-15.) Both of the grounds fell under the Court's analysis of the Plaintiffs' likelihood of success on the merits. *Id.*

Although facial challenges to a licensing scheme are disfavored, they are permitted in the First Amendment context when the licensing scheme is challenged as permitting undue delay, "such that 'every application of the statute create[s] an impermissible risk of suppression of ideas,'" as is the case here. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223-24 (1990) (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798, n. 15 (1984)). Licensing schemes such as the one at issue are subject to prior restraint First Amendment constitutional analysis. While there is a "heavy presumption against [their] constitutionality," *FW/PBS, Inc., v. Cdr of Dallas*, 493 U.S. 215, 225 (1990) (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 562 (1975)), such a system will be upheld if it incorporates certain procedural safeguards. *Freedman v. Maryland*, 38 U.S. 51, 58 (1965). Specifically, the decision-maker must not be given unlimited discretion so as to risk suppression of protected speech. *FW/PBS*, 493 U.S. at 225026. An ordinance which does not restrict the time in which a decision must be made is a form of such unbridled discretion. *East Brooks Books v. City of Memphis*, 48 F.3d 220, 224 (6th Cir. 1995). Accordingly, a statute must impose restraints in advance of a final judicial determination for only a brief period of time, preserve the status quo during that time, and afford expeditious judicial review. *Id.* at 224.

1. Status Quo

Plaintiffs did not respond to Defendant's assertion that the amended Ordinance now provides for preservation of the status quo pending judicial review, (*See* Pls.' Mem.), as Defendant noted during oral argument. Upon review of the record and in light of Plaintiffs' failure to respond to this issue, the Court finds that the amended Ordinance does, in fact, provide for the maintenance of the status quo pending judicial review such that Plaintiffs are no longer likely to succeed on the merits of this particular issue.

2. Prompt Judicial Review

The Defendant argues that the amended Ordinance, together with the amended State stature regarding writs of certiorari, provide for prompt judicial review. The administrative determination will be complete within 47 days and the appeal process following adverse administrative decisions will be complete within 40 days. (Def.'s Mem. at 9.) The 47-day process is mandated by the timetable built into the Ordinance. The amended writ statute answers this Court's concern regarding the issuance of an opinion within a mandated period of time by requiring that all First Amendment cases be heard and decided within 40 days. (Def.'s Mem. at 7).

Defendant next points out that the 40-day period within which writ decisions regarding the First Amendment must be made is less than the impermissible 5 month delay cited in *East Brooks Books v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995) (rehearing and suggestion for rehearing *en banc* denied May 5, 1995). Furthermore, though the case law does not indicate what specific time period would satisfy the "prompt judicial review" standard, *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 373-74 (1971), determined that 60 days for the completion of judicial proceedings was sufficient to meet the standard. Thus, the period for completion of judicial review under the amended Ordinance

sufficiently cures the enjoined Ordinance's flaw in not providing any meaningful period of time within which an opinion must issue, as well as meets the legal standard for "prompt judicial review."

The Defendant further notes that the Court cited approvingly to a case in its Memorandum granting the preliminary injunction in which a 90-day waiting period from the beginning to the end of the judicial proceedings was found reasonable. *Wolff v. City of Monticello*, 803 F. Supp. 1568, 1574 (D. Minn. 1992). The waiting period under the ordinance as amended is only 87 days - 47 for the initial determination and 40 for the judicial review. Finally, in the event that the court fails to rule within 40 days of the filing of the appeal, the license shall issue. Metropolitan Code § 6.54.150(A)(10).

Plaintiffs counter with three arguments. First, Plaintiffs contend that in the Sixth Circuit, "prompt judicial review" requires a prompt judicial *determination,* not merely access to review. (Pls.' Mem. at 3-4 citing *East Brooks Books, supra.*) Second, the Ordinance still does not mandate a time by which a writ petition must be granted or denied. (Pls.' Mem. at 5.) Since courts determine their own dockets and the only remedy for tardiness is popular vote, the Ordinance cannot guarantee that a decision will be handed down by the court hearing the writ petition within a sufficiently "prompt" period of time. *Id.* Plaintiffs also contend that courts will not be bound by the 40-day period in which they are to hand down decisions since a similar statute requiring Judges in non jury cases to render an opinion within 60 days was held to be directory, not mandatory. (*Id.* at 5-6, citing *Schaeffer v. Richard*, 43 Tenn. App. 205, 306 S.W.2d 340 (1956, *cert.* den. Tenn. Sup. Ct, 1957.) Finally, Plaintiffs argue that the granting of a writ petition is discretionary and provides for an extremely narrow scope of review even when granted. (*Id.* at 6-13.) Common law writs only allow a determination of whether the Board acted illegally, fraudulently, or beyond its jurisdiction. (*Id.* at

8.) Thus, Plaintiffs contend, the intrinsic correctness of the Board's decision can not be reviewed pursuant to a common law writ. (*Id.* at 6.)

The Court notes initially that Plaintiffs are correct in their assertion that the Sixth Circuit requires a prompt judicial determination in order to meet the "prompt judicial review" standard. J. David Guerrera, Note, *Constitutional Law: The Meaning of Prompt Judicial Review Under the Prior Restraint Doctrine After FW/PBS v. Cdr of Dallas*, 62 Brook. L. Rev., 1217, 1241-42. However, the Court disagrees with Plaintiffs that the State writ of *certiorari* statute as amended does not mandate a determination within a sufficiently prompt period of time. The statute clearly states that a decision must be handed down within 40 days of the court granting the writ of *certiorari*. Tenn. Code Ann. § 27-9-111. The Defendant has filed an affidavit from the Clerk and Master for the Chancery Courts of Davidson County in which she swears that "[g]enerally, our office processes all petitions for a writ of *certiorari* including presenting the proposed order and petition to a chancellor, docketing the signed order and issuing the writ of *certiorari* within two days of the filing of the petition." (Def.'s Exhibit D to Mot. at 2.) Thus, Plaintiffs' concern that the courts will not promptly determine whether or not to grant the writ petition is unfounded.

Plaintiffs second contention, that the courts will not be bound by the 40-day period, relies on reasoning from *Schaeffer v. Richard, supra.* The *Schaeffer* decision is distinguishable, however, since in that case, the legislature did not declare void decisions that were not rendered within the mandated 60-day period. *Id.* at 212. Thus, in that case there was no recourse if a decision was rendered outside of the "mandated" period. In the instant case, if a decision is not rendered within the 40-day period, then the license shall issue, thus a safeguard is in place against judicial tardiness. The legislature need not declare the tardy decision void, since the license shall issue and remain in effect until and unless the

decision finally rendered revokes it. Therefore, this argument by the Plaintiffs also lacks merit.

As for Plaintiffs' contention that the granting of the writ is discretionary and that it is too narrow in scope to provide adequate judicial review, this Court notes that Plaintiffs admitted during oral argument that Defendant has done all that it can do within its power as Metro to make judicial review of Board determinations prompt. The Court is not convinced by Plaintiffs' argument that the amended statutory language of the State writ statute does not require that all First Amendment cases be heard, thereby causing a fatal flaw in the statute. Plaintiffs themselves argue that without a review under a writ of *certiorari*, applicants will have no basis for review of adverse decisions. The Tennessee Supreme Court has ruled, however, that common law writs should be granted where denial of the writ is "tantamount to the denial to either party of a day in court." *State v. Johnson*, 569 S.W.2d 808, 815 (Tenn. 1978) (Finding exceptions to the general rule that the common law writ does not permit review of the correctness of a judgment.). As for the scope of review, the state courts have determined that a violation of a constitutional standard falls within the definition of "illegal, arbitrary, or fraudulent" actions which are reviewable under common law writs. *Hoover, Inc., v. Metro Bd. of Zoning Appeals*, 924 S.W.2d 900, 905 (Tenn.App. 1996.). Furthermore, "[u]nder the common law writ of certiorari .... [w]hether or not there is any material evidence to support the action of the agency is a question of law to be decided by the reviewing court *upon an examination of the evidence introduced before the agency." Watts v. Civil Serv. Bd. for Columbia*, 606 S.W.2d 274, 276-77 (Tenn. 1980) (Emphasis added.) Thus, the Court finds that Plaintiffs are incorrect in asserting that the "intrinsic correctness" of the Board's decisions under the Ordinance cannot be reviewed.

Plaintiffs argued at the hearing that a mistake in documentation for an entertainer as to his or her age, for

example, would not be reviewable under a writ of *certiorari*. The Court submits that such an error is easily remedied by providing the correct documentation to the Board via a corrected or even a completely new application. Furthermore, in the Court's Memorandum granting the preliminary injunction, the Court referenced a proposed rule from Defendants that was more vague than the language ultimately used to amend the Ordinance and stated that the rule was flawed in that it was merely a proposal, but that an enacted version of the rule is "exactly what must be promulgated in order to satisfy the judicial review requirements under the prior restraint doctrine." (Ct.'s Mem. at 15.) Defendant has come back to this Court with an amendment more specific than its proposed rule which mandates that decisions must be rendered by courts within an acceptable, specific period of time. Furthermore, the Ordinance now requires that a license issue if the judicial proceedings take longer than 40 days. This Court noted in its December 8, 1997 Memorandum that such a provision would meet the directives of the First Amendment. (*Id.*)

Based on the above analysis, this Court finds that Plaintiffs can no longer demonstrate a substantial likelihood of success on the merits, as they could when the preliminary injunction was originally issued. Therefore, although analysis of the original Ordinance favored the Plaintiffs with respect to the other three factors since Plaintiffs established a substantial likelihood of success on the merits, that is no longer the case.

B. *Irreparable Harm*

It is settled that non-obscene nude dancing is constitutionally protected activity within the scope of the First Amendment. *Barnes v. Glen Theaters, Inc.*, 501 U.S. 560, 565-66 (1991); *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d at 1075. However, since prior restraint of the dancing is no longer a substantial threat, the

Court finds that irreparable harm will not be caused if the Ordinance as amended goes into effect.

C. *Public Interest*

Since the statute no longer presents a substantial possibility of infringing upon an individual's constitutional rights, the amelioration of the harmful side effects that sexually oriented businesses may promote is sufficient for this Court to find that this factor favors the Defendant.

D. *Possibility of Substantial Harm to Others*

This Court has found that an individual's constitutional rights are no longer at substantial risk under the Ordinance; therefore, it follows that there is no risk of substantial harm to others if the injunction is lifted. Indeed, this Court would harm the autonomy of the legislative bodies of the State of Tennessee and the City of Nashville if it continued to enjoin this Ordinance having found that Plaintiffs lack a substantial likelihood of success on the merits. Thus, this factor favors Defendant's position, as well.

## III. Conclusion

The Court finds that the Ordinance as amended no longer presents substantial prior restraint problems since it provides for prompt judicial review of adverse decisions and the maintenance of the status quo while adverse decisions are appealed. Therefore, Plaintiffs can no longer demonstrate a substantial likelihood of success on the merits and the preliminary injunction issued by this Court on December 7, 1997 is no longer justified. Accordingly, Defendant's motion to dissolve that preliminary injunction is GRANTED and the injunction is hereby dissolved.

An Order consistent with this memorandum will be filed contemporaneously.

Entered this the 1st day of December, 1998.

/S/

JOHN T. NIXON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

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| DEJA VU OF NASHVILLE, INC., et al., | |
| v. | \| No. 3 :97-1066 |
| THE METROPOLITAN GOVERNMENT | \| Judge Nixon |
| OF NASHVILLE AND DAVIDSON | \| Magistrate |
| COUNTY, et al., | \| Judge Griffin |
| and | \| Consolidated |
| | \| Cases |
| JERRY C. PENDERGRASS, et al., | |
| v. | \| No. 3 :97-1176 |
| THE METROPOLITAN GOVERNMENT | \| Judge Nixon |
| OF NASHVILLE AND DAVIDSON | \| Magistrate |
| COUNTY, et al. | \| Judge Griffin |

**ORDER**

Pending before the Court is Defendant's Motion to Dissolve Preliminary Injunction, (Doc. No. 34), to which Plaintiffs have filed a Response, (Doc. No. 63). Defendant, in turn, has filed a Reply to Plaintiffs' Response. (Doc. No. 67.) For the reasons set forth in the accompanying memorandum, Defendant's motion is GRANTED and the preliminary injunction imposed in this case is hereby DISSOLVED.

It is so ORDERED.

Entered this the 1st day of December, 1998.

/S/
JOHN T. NIXON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

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| DEJA VU OF NASHVILLE, INC., et al., | |
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| | Judge Nixon |
| | Magistrate |
| | Judge Griffin |
| THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al., | |

**MEMORANDUM**

Pending before the Court is the Plaintiffs' Motion for Preliminary Injunction (Doc. No. 2), to which the Defendants have filed a Response (Doc. No. 19). Also pending is the Motion by Jerry C. Pendergrass and others to intervene (Doc. No. 11). The same parties seeking to intervene in this action subsequently initiated their own action, alleging similar harms: Pendergrass v. Metropolitan Government of Nashville and Davidson County, Case No. 3:97-1176. The Plaintiffs in this later action have also filed a Motion for Preliminary Injunction (Doc. No. 3). Because these two cases present similar issues of law and fact, such that consolidation would further judicial economy and impose no prejudice upon the parties, the Court hereby orders that the two actions be consolidated. Accordingly, the motion to intervene is now moot and the Plaintiffs' respective motions for a preliminary injunction will be treated jointly. The Court held a hearing on December 1, 1997, during which time the parties had an opportunity to present evidence and argue their positions.

After reviewing the record, the Court finds that the Plaintiffs have satisfied their burden of proving the elements

necessary for a preliminary injunction, and orders that the Defendants be hereby enjoined from enforcing any of the provisions of Chapter 6.54 of the Metropolitan Code of Laws.

## I. BACKGROUND

The Plaintiffs are a group of establishments and individuals which provide adult public entertainment in the form of live nude and/or semi-nude performance dance entertainment in a club environment, and operate adult theaters and bookstores. They are seeking to enjoin a regulatory scheme enacted by the Council of the Metropolitan Government of Nashville and Davidson County on August 19, 1997, which requires "sexually oriented businesses" to obtain licenses before being permitted to operate, and adult entertainers employed in these establishments to also obtain permits in order to perform. The mayor approved the ordinance on August 25, 1997, and it took effect on November 1, 1997. Existing business have one hundred and twenty days after November 1st to apply for a license, Nashville and Davidson County, Tenn., Code § 6.54.030(F) (Supp. Sept. 1997), and entertainers have forty-five days from that date to apply for a permit, § 6.54.060(B).

The ordinance specifically requires partners in a partnership who participate in the day-to-day running of a sexually oriented business, majority stockholders of such businesses, and any officers or directors of such businesses (collectively "operators"), to obtain licenses to operate issued by a specially established board. § 6.54.010(S). The term "sexually oriented business" as defined by the ordinance includes bookstores, video stores, theaters, and nightclubs which "regularly present[] material or exhibitions distinguished or characterized by an emphasis on matter depicting . . 'specified sexual activities' or 'specified anatomical areas.'" § 6.54.010(S)(1)-(4). The application for a license requires the operators to provide such information as addresses, employment history, criminal violations of a sexual

nature or involving moral turpitude, fingerprints, citations of zoning code violations, and diagrams of booth, stalls, and cubicles. §§ 6.54.040(A)(5)-(6), 6.54.070(A)(2). Applicants who have been convicted or pleaded nolo contendere to a crime of a sexual nature or involving moral turpitude are prohibited from obtaining licenses for specified periods of time, two years from the date of conviction for a misdemeanor, and five years from the date of conviction for a felony. §§ 6.54.040(C)(2)(a)-(b), 6.54.070(A)(9). Similar requirements apply for entertainers seeking to obtain a permit. Licenses must be renewed on a yearly basis, and can be revoked for a variety of reasons specifically prescribed in the statute, including discovery that an operator employs an entertainer who does not have a permit, or furnishes sexually explicit material to minors. §§ 6.54.100, 6.54.140.

Once the application is received, the board must distribute a copy of the application "promptly" to the police department, the department of codes and administration, the health department, the fire department, and the applicant. § 6.54.040(A)(1). The departments are required to conduct inspections and to provide the reports to the board within thirty days of receipt of the application. § 6.54.040(B)(3). The board is then required to make its determination within twenty days of receiving these reports. §6.54.040(C)(1). However, if the board needs additional information, or is awaiting out-of-state documentation, it may hold the application for an additional thirty days before issuing its initial decision. § 6.54.040(C)(7).

The ordinance makes provisions for the appeal of unfavorable decisions. In the case of both operators and entertainers, if the license is denied, the applicant has the right to request a hearing within ten days of notification of the decision. §§ 6.54.040(E)(1), 6.54.070(D)(6). Once the request is received, the board is required to schedule a hearing at its

next meeting, during which time it hears evidence presented by the applicant and issues its final decision.[1] §§ 6.54.040(E)(1)(b), 6.54.070(D)(6)(b). The denial of a license is required to be mailed within ten days to the applicant's address. §§ 6.54.040(E)(1)(e), 6.54.070(D)(6)(e). An appeal of this decision may be made directly to the Chancery Court for the state of Tennessee. §§ 6.54.040(E)(2), 6.54.070(D)(7). The metropolitan government department of law may institute proceedings for a declaratory judgment. *Id.* In addition, the ordinance permits an applicant to appeal by filing a petition for a writ of certiorari, in which case the board must submit all records of the proceedings before it to the court within ten days. *Id.*

## II. DISCUSSION

In order to determine the propriety of injunctive relief, the court must look to the following factors: (1) the likelihood of the movant's success on the merits; (2) the irreparable harm that could result if the injunction is not issued; (3) the impact on the public interest of granting or denying the injunction; and (4) the possibility of substantial harm to others if the injunction is issued. *G & V Lounge, Inc., v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994). Sixth Circuit precedent makes it clear that these four factors are not absolute prerequisites, but must rather be balanced by the Court. *Performance Unlimited v. Questar Pubs., Inc.*, 52 F.3d 1373, 1381 (6th Cir. 1993) (citing *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)). If a party demonstrates substantial likelihood of success on the merits, the three other factors will favor the party as well. *Planned Parenthood Ass'n v. McWherter*, 716 F. Supp. 1064, 1066 (M.D. Term. 1980); *cf. Performance Unlimited*, 52 F.3d at 1385-86 (quoting *Merrill Lunch, Pierce, Fenner & Smith*, 836

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[1] The board is required to meet twice per month. § 6.54.020(D)(1). Board Policy No. 10 dictates that the board must meet the second and fourth Tuesdays of every month.

F. Supp. 428, 432 (W.D. Mich. 1993) (citation omitted)). The Court will therefore focus its inquiry upon the first factor, although it will also discuss the others in turn.

A. *Likelihood of Success on the Merits*

For the purpose of the preliminary injunction, the Plaintiffs have limited their motion to two issues, first, they challenge the ordinance on its face because it fails to provide for prompt judicial review of the board's decision, and second, they challenge the disabling provisions of the ordinance.

Although facial challenges to a licensing scheme are disfavored, they are permitted in the First Amendment context when the licensing scheme is challenged as permitting undue delay, "such that 'every application of the statute create[s] an impermissible risk of suppression of ideas,'" as is the case here. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223-24 (1990) (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798, n. 15 (1984)). Licensing schemes such as the one at issue are subject to prior restraint First Amendment constitutional analysis. While there is a "heavy presumption against [their] constitutionality," *FW/PBS, Inc., v. City of Dallas*, 493 U.S. 215, 225 (1990) (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 562 (1975)), such a system will be upheld if it incorporates certain procedural safeguards. *Freedman v. Maryland*, 38 U.S. 51, 58 (1965). Specifically, the decision-maker must not be given unlimited discretion so as to risk suppression of protected speech. *FW/PBS*, 493 U.S. at 225026. An ordinance which does not restrict the time in which a decision must be made is a form of such unbridled discretion. *East Brooks Books v. City of Memphis*, 48 F.3d 220, 224 (6th Cir. 1995). Accordingly, a statute must impose restraints in advance of a final judicial determination for only a brief period time, preserve the status quo during that time, and afford expeditious judicial review. *Id.* at 224.

1. *Undue Delay*

The Plaintiffs allege that this ordinance fails to meet these promptness requirements for three reasons. First, it allows for a wait of almost one hundred days before an appeals hearing is conducted. This includes a one day wait for the board to distribute the application;[2] thirty days for the departments to conduct their inspections; twenty days for the board to make its determination; in certain circumstances, an additional thirty days for the board to act; one day for the applicant to request an appeals hearing (assuming he or she acts promptly); and fourteen days for the board to meet and hold the hearing. The Plaintiffs claim that this delay exceeds the sixty-day delay in *East Brooks Books*, which the Sixth Circuit held was unconstitutional.

The Defendants maintain that the ordinance places brief and specified time periods on the board to act on the application. They calculate the time period in which an initial decision is made differently, without including the time required to hold a hearing on appeal before the board. They point out that the ordinance imposes only an eighty-one-day waiting period before the initial determination by the board, and that this is close to the sixty-day period which was upheld in *DLS, Inc. v. City of Chattanooga*, 894 F. Supp. 1140 (E.D. Tenn. 1995), and *Ellwest Stereo Theater, Inc. v. Boxer*, 718 F. Supp. 1553, 1570 (M.D. Tenn. 1989).

However, neither *East Brooks Books*, *DLS*, or *Ellwest* are directly on point with respect to this issue. The opinion in *Ellwest* does not even reach the issue of whether the length of time given to a decision-maker to issue a license suppresses

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[2] Although the statute itself only requires that the board distribute the application promptly, the board has interpreted this to mean that the application should be distributed the same day they are received, or the following business day if received after 4:00 p.m. Board Policy No. 5. For the purposes of this motion, the Court will accept the board's interpretation.

free speech. Similarly, the court in *East Brooks Books* did not discuss whether the time given to the decision-makers to issue a license was not constrained and therefore a form of unbridled discretion. Rather, the court focused on whether there was prompt judicial review of the licensing decisions. *See East Brooks Books*, 48 F.3d at 224-225. The Supreme Court in *FW/PBS* has made clear however, that these are two separate inquiries. First, the ordinance must place limits on the time during which the decision to issue a license is made, and preserve the status quo during that time, and second, there must also be prompt judicial review of this decision. *FW/PBS*, 493 U.S. at 227. Finally, while the district court in DLS did discuss the issue of whether the licensing ordinance sufficiently limited the time in which the decision-maker must determine whether to issue a license, the Sixth Circuit on appeal did not touch upon the issue. This was because the Sixth Circuit determined that the Plaintiffs did not have standing to challenge the licensing scheme. *See DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 413 (6th Cir. 1997). Thus, since the district court erroneously concluded that the plaintiffs had standing to challenge the licensing scheme, any decision that it made with respect to this issue is dicta.

Accordingly, the most recent and direct authority on this issue is the Supreme Court decision in *FW/PBS*. In that case, Justice O'Connor[3] determined that the licensing scheme at issue in that case should be struck down because it allowed for an "indefinite postponement of the issuance of a license." *FW/PBS*, 493 U.S. at 227. This was so because although the

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[3] Only two other Justices, Stevens and Kennedy, joined in this part of Justice O'Conner's opinion. However, Justice Brennan, Marshall, and Blackmum in their concurrence agreed with the aspects of Justice O'Connor's opinion that are at issue here. These Justices' only disagreement with O'Connor's opinion was with her determination that the government need not bear the burden of effecting the denial of a license in court, or bear the burden of proof once in court. *See FW/PBS*, 493 U.S. at 439-42.

ordinance required the chief of police to rule on the issuance of a license within thirty days after the receipt of the application, a license could not be issued without the approval of other departments. *Id.* The ordinance did not limit the time during which these departments were required to make their inspections. *Id.*

The ordinance presently at issue has a sufficiently circumscribed time limit for the issuance of a license or permit. The only indeterminate time allowance in the ordinance is the provision that directs the board to distribute the application, when first received, "promptly" to the various departments that need to conduct inspections. § 6.54.040(A)(1). However, the board has sufficiently cured this by adopting a policy which requires them to distribute the application at the latest by the next business day. Board Rule 5. The Plaintiffs nevertheless maintain that the waiting period, even if sufficiently specified, is too long to constitute a "reasonable time period." *See East Brooks Books*, 48 F.3d at 224. "The reasonableness of the time period during which a restraint on speech may operate prior to judicial review 'may vary in different contexts.'" *11126 Baltimore v. Prince George's County, MD*, 58 F.3d 988, 997 (4th Cir. 1995) (quoting *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 374 (1971)). The court should take into account "the type of judgments to be made by the government officials and the hardship placed on the class of applicants by the restraint." *Id.* (citation omitted).

As an initial matter, it should be noted that the time period in which an initial decision must be made does not include the time it takes to appeal or obtain a hearing at the administrative level. The Sixth Circuit made this clear in *East Brooks Books*, when it included the time required to obtain a hearing before the Chief of Police in its computation of the time it took to obtain *judicial review* of the ordinance. *East Brooks Books*, 48 F.3d at 225. That said, it appears from review of other decisions that the time it takes to obtain an

initial licensing determination under the ordinance presently at issue is at the borderline of constitutionality. *See, e.g., 1126 Baltimore*, 58 F.3d at 997 (150-day delay is not a reasonably brief time); *TK's Video, Inc. v. Denton County, Tex.*, 24 F.3d 705, 708 (5th Cir. 1994) (upholding 60-day waiting period); *Chesapeake B & M, Inc. v. Hartford County, Md.*, 831 F. Supp. 1241, 1249-50 (D. Md. 1993) (upholding 44-day waiting period), *rev'd in part, vacated in part, and remanded on other grounds*, 58 F.3d 1005 (4th Cir. 1995) (en banc); *Wolff v. City of Monticello*, 803 F. Supp. 1568, 1574 (D. Minn. 1992) (90-day waiting period not unreasonable). However, considering that the applications must be distributed to other departments for inspections, that the board may only hold the applications for thirty of those days under specified circumstances, and that businesses already established can continue operating pending a licensing decision, the Court finds that this waiting period is not unreasonable.

2. *Status Quo*

However, not only must the waiting period be reasonable, but the status quo must be preserved during that time. *East Brooks Books*, 48 F.3d at 224. The Plaintiffs' second challenge to the ordinance relates to this issue. They claim that the ordinance does not provide for the preservation of the status quo pending judicial review, or in the event that the board fails to issue a timely licensing opinion. The Court agrees. Section 6.54.140 of the ordinance, combined with Section 6.54.020(G)(3) provide for only a ten-day hiatus before the board's decision takes effect. Section 6.54.140 provides that a license/permit shall be valid until ten days have elapsed since the board's decision, or until a hearing on the matter is held. If at the conclusion of the hearing, the board affirms its denial of license or permit, this decision does not take effect until ten days have elapsed, in order to give the aggrieved party time to file an appeal. Section 6.54.020(G)(3). The ordinance is silent as to whether the effect of a denial is

stayed after those ten days pending judicial review. The board's policies are equally silent on this issue. Although Board Policy 40 states that any denial, revocation, or suspension of a license shall not go into effect until thirty days have elapsed since the board's final decision and there has been no appeal, it does not explain what the status of a license is while an appeal is pending. Furthermore, the ordinance does not specify what the effect would be of the board's failure to act on an application in a timely manner. The Defendants have presented the Court with Board Policy 70, which states in relevant part:

> It shall be the policy of this Board that any license or permit not acted on by the Board in the time allowed by the ordinance, due to any fault on the part of the Board or the Board's administration, shall be granted.

Def's Ex. 2 at 2. However, as the Plaintiffs have pointed out, the policy only relates to failure to act on an application due to fault by the Board. It does not encompass failure to act timely due to failure of, for example, the police or fire department to conduct its investigation within the prescribed thirty days. Moreover, this policy is inconsistent with Section 6.54.020(C)(10), which prohibits the board from issuing a license "unless the police department has investigated the applicant's criminal history . . .". Finally, it is unclear from the policy just how a license would be granted if the reason a license has not been issued on time is that the board has not been able to meet or to form a quorum.[4] Without any action on the part of the board, the applicant will presumably not have a tangible permit in his or her possession.

3. *Judicial Review*

Lastly, the Plaintiffs contend that the ordinance is invalid because it fails to provide for prompt judicial review. Again,

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[4] Board Policy 20 requires that a quorum must be present in order for the board to take action.

the Court agrees with the Plaintiffs. Under the ordinance as written, an applicant can be required to wait for an indefinite period of time before obtaining judicial review of the board's decision. After a hearing is requested, the applicant should receive a hearing in fourteen days, since the board holds meetings bimonthly. § 6.54.020(D)(1). The board must then notify an applicant of the denial of his or her license within ten days after a meeting is conducted. The ordinance specifies that the applicant can then appeal from an unfavorable decision at a hearing directly to the Chancery Court of Davidson County through a petition for a writ of certiorari. § 6.54.160. The administrative record must be transmitted to the court within ten days of the hearing, § 6.54.160, however, a hearing before the court must wait at least ninety days in order to allow for the filing of a brief, response, and reply brief. Davidson County Local Rule § 30.02. Although the appeal would at that point have precedence over other matters before the court, the scheduling of a hearing is dependent on the court's docket. Thus, the Plaintiffs are not guaranteed judicial review within any specified period of time. Moreover, the state chancellor is not required to issue an opinion within any mandated period of time. *See* Tenn. Code Ann. § 27-9-111.

The circuits are currently split with respect to the meaning of "prompt judicial review." The First, Fifth, and Seventh Circuits have concluded that access to a judicial proceeding is sufficient to constitute prompt judicial review. J. David Guerrera, Note, *Constitutional Law: The Meaning of Prompt Judicial Review Under the Prior Restraint Doctrine After FW/PBS v. City of Dallas,* 62 Brook. L. Rev., 1217, 1220 (1996). Conversely, the Fourth, Sixth, and Eleventh Circuits have required a prompt judicial *determination. Id.* at 1241-42. In *East Brooks Books*, the Sixth Circuit concluded that a potential wait of over five months before a judicial ruling was impermissible. 48 F.3d at 225. It further determined that the possibility of appeal to the Tennessee state courts through a writ of certiorari did not constitute

prompt judicial review precisely because this procedure did not require the courts to issue a ruling within any specified period of time. *Id.* The ordinance at issue in the present case allows for up to fifteen days for the board to hold a hearing (one day to request and fourteen days for the hearing to be held), ten days before the denial is mailed to the applicant, ten days for the board to forward a copy of the proceedings before it to the court, and a wait of at least ninety days before a state court can issue a ruling. The applicant must thus wait at least three and one-half months minimum before a court issues a ruling on its application. However, since there are no time restraints on the court's issuance of a decision, potential delays of over five months are possible under this statute. *East Brooke Books* prohibits this kind of delay. *See also Smith v. City of Clarksville*, No. 3-94-0539 (M.D. Tenn. Mar. 14, 1996) (invalidating a licensing scheme similar to the one at issue because it failed to provide for expeditious judicial review).

The Defendants offer three possible ways to rehabilitate this ordinance. First, they contend that under the local rules, it is possible for an applicant to move the Chancery Court for an expedited briefing schedule, and pursuant to Local Rule 18.01[5], move the court to set an early trial date. They contend that while Tenn. Code Ann. § 27-9-111 provides that in appeals of board determinations, the court shall set a trial ninety days after the board files a transcript of the proceedings before it, and that the trial shall have precedence over other litigation, this statute does not require a court to wait ninety days before setting a case for trial. They further assert that to the extent that it does mandate this, it violates the separation

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[5] The rule provides: "Cases shall be set for trial in one of the following ways: (a) by agreement of counsel after consultation with the Calendar Clerk for Chancery and Probate Court or the Assignment Clerk for Circuit Court; (b) by motion; or (c) by the court with notice to counsel."

of powers doctrine, as it infringes upon the court's ability to set its own docket. *See Summers v. Thompson*, 764 S.W.2d 182, 188-190 (Tenn. 1988) (Drowota, J., concurring) (discussing generally the respective powers of the judiciary and the legislature). However, it is clear that the Defendants' proposed method of judicial review would not set clear boundaries on the time that a court must make a decision, and thus does no pass constitutional muster under *East Brooks Books*. Second, the Defendants contend that, unlike the ordinance in *Smith v. City of Clarksville*, the ordinance at issue does not require that any appeal be processed through a writ of certiorari at the state level. Although the ordinance at hand does provide that an applicant may "choose" to appeal to the state through a writ of certiorari, § 6.54.100(M), the ordinance by its terms does not foreclose other methods of appeal. Specifically, the Defendants maintain that an applicant can appeal by petitioning for a temporary restraining order ("TRO") and preliminary injunction. However, again, the Defendants have not directed the Court to any rule which requires a court to decide a motion for a TRO or preliminary injunction within any prescribed period of time. Thus, this procedure suffers from the same infirmities as a petition for writ of certiorari. Finally, the Defendants have submitted to the Court Proposed New Local Rule, § 30.05, which provides that:

> If the petitioner-appellant alleges that the decision of an administrtive tribunal or agency unlawfully results in the prior restraint of his or her rights that are guaranteed by the First Amendment to the U.S. Constitution, and either party requests an expedited hearing, the court shall immediately schedule a hearing, establish an expedited briefing schedule that will permit the court to adjudicate the matter promptly, and in no event later than fourteen days after the record is filed.

However, the proposed rule suffers from several problems, the most important of which is that it is a proposed rule, and there is no guarantee that it will be adopted by the courts. Furthermore, the text of the rule is unclear, as it does not specify exactly *what* must be done in fourteen days: the scheduing of a hearing, and adjudication, or both. Thus, the Court cannot conclude that this local rule meets the expeditious judicial review requirements of the First Amendment. That aside, it appears to the Court that this kind of rule is exactly what must be promulgated in order to satisfy the judicial review requirements under the prior restraint doctrine. Although the legislature may not be able to require the courts to decide a matter within a prescribed period of time, the directives of the First Amendment may still be met if an ordinance provides that a permit or license should issue in the event that the court does not adjudicate a matter within a given time (which must be less than five months per *East Brooks Books*).

4. *Disabling Provisions*

Because the Court has determined that the ordinance is unconstitutional because it does not preserve the status quo or provide for prompt judicial review, it does not need to reach the issue of whether the disabling provisions of the ordinance are unconstitutional.

B. *Irreparable Harm*

Nonobscene nude dancing is constitutionally-protected activity within the scope of the First Amendment. *Barnes v. Glen Theatres, Inc.*, 501 U.S. 560, 565-66 (1991); *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d at 1075. The ordinance, if allowed to take effect, would condition the Plaintiff's exercise of their First Amendment freedoms on the receipt of a license, and would prohibit them from excercising this right without a license. It is well-established that "[t]he loss of First Amendment freedoms, for

even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The Defendants have urged this Court to find that there is no immediate irreparable injury because operators do not even have to file an application until March of next year, and although entertainers must file their applications by November 15th of this year, the board will not rule on their applications until, at the earliest, fifty days later. However, in the case of entertainers, the mere fact that they have to file an application infringes on their First Amendment freedoms, since the application requires them to submit a picture, a list of prior employers, prior addresses, and prior convictions of a sexual nature or involving moral turpitude. Furthermore, since the ordinance is already in effect, operators are already subject to it and live under the threat of having to submit licenses to the board. The Court finds that this is sufficient immediate irreparable harm for it to enjoin the provisions of the ordinance relating to operators.

C. *Public Interest*

The Court finds that the issuance of an injunction at this point would be in the public interest: it "is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc.*, 23 F.3d at 1079. Although it is also in the public interest to ameliorate the harmful side effects that sexually-oriented businesses may promote, as specified in the preamble to the ordinance, it is not in the public interest to do this through a statute that violates an individual's First Amendment rights.

D. *Possibility of Substantial Harm to Others*

There is very little possibility of substantial harm to others if the injunction is not issued. Although the ordinance is directed at curtailing certain crimes and health hazards which are the "secondary effects of adult entertainment establishments," *see* Bill No. 097-796, there are other means of regulating these effects that will continue to operate while

the injunction is in effect, for example, the police and fire departments.

## III. CONCLUSION

The Court finds that the ordinance must be enjoined in its entirety because it fails to maintain the status quo while an initial determination of the board is pending, and does not provide for prompt judicial review. Although the ordinance is severable, § 56.54.170, the fact that it fails to provide expeditious judicial review requires the Court to invalidate it in its entirety, as none of the provisions are salvageable. Accordingly, the Metropolitan Government of Nashville and Davidson County Tennessee, and Emmett Turner, Chief of Police, are enjoined from enforcing any of the provisions of this ordinance until otherwise directed by this Court.

An order consistent with this memorandum will be filed contemporaneously.

Entered this the 5th day of December, 1997.

/S/

JOHN T. NIXON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

| | |
|---|---|
| DEJA VU OF NASHVILLE, INC., et al., | |
| | |
| v. | No. 3:97-1066 |
| | Judge Nixon |
| | Magistrate |
| | Judge Griffin |
| THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al., | |

**ORDER**

Pending before the Court is the Plaintiffs' Motion for Preliminary Injunction (Doc. No. 2), to which the Defendants have filed a Response (Doc. No. 19). Also pending is the Motion by Jerry C. Pendergrass and others to intervene (Doc. No. 11). The same parties seeking to intervene in this action subsequently initiated their own action, alleging similar harms: Pendergrass v. Metropolitan Government of Nashville and Davidson County, Case No. 3:97-1176. The Plaintiffs in this later action have also filed a Motion for Preliminary Injunction (Doc. No. 3). Because these two cases present similar issues of law and fact, such that consolidation would further judicial economy and impose no prejudice upon the parties, the Court hereby ORDERS that the two actions be consolidated. Accordingly, the motion to intervene is now moot and the Plaintiffs' respective motions for a preliminary injunction will be treated jointly.

After reviewing the record, the Court finds that the Plaintiffs' Motion for a Preliminary Injunction should be GRANTED. It is ORDERED that the Defendants, Metropolitan Government of Nashville and Davidson County, and Emmett Turner, Chief of Police, are hereby prohibited

from enforcing any of the provisions of chapter 6.54 of the Nashville and Davidson County, Tenn. Code of Laws until otherwise directed by the Court.

It is so ORDERED.

Entered this the 5th day of December, 1997.

/S/

JOHN T. NIXON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

# RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

U.S. Const., amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Tenn. Code § 27-9-111 Hearing – Findings

(e) If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution of the United States, and either the petitioner or the respondent requests an expedited hearing, the court shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari. When an expedited hearing is requested, the board or commission shall forward the transcript described in § 27-9-109 within seven (7) days of the grant of the writ of certiorari.

Chapter 6.54 (As at Jan. 1999)
SEXUALLY ORIENTED BUSINESSES

Sections:


6.54.010 Definitions.
6.54.020 Sexually oriental business licensing board.
6.54.030 License required.
6.54.040 Application for license.
6.54.050 Standards for issuance of license.
6.54.060 Permit required.
6.54.070 Application for permit.
6.54.080 Standards for issuance of a permit.
6.54.090 Fees.
6.54.100 Display of license or permit.
6.54.110 Renewal of license or permit.
6.54.120 Hours of operation.
6.54.130 Responsibilities of the operator.
6.54.140 Prohibitions and unlawful sexual acts.
6.54.150 Revocation or suspension of license/permit.
6.54.160 Penalties and prosecutions.
6.54.170 Invalidity of part.


6.54.010 Definitions.

For the purpose of this chapter, the words and phrases used in this chapter shall have the following meanings, unless otherwise clearly indicated by the context:

A. "Aggravated rape" means as defined in the Tennessee Code Annotated Section 39-15-502.

B. "Aggravated sexual battery" means as defined in the Tennessee Code Annotated Section 39-15-504.

C. "Crimes of a sexual nature" means the crimes of rape, aggravated rape, aggravated sexual assault, public indecency,

statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or crimes committed in a jurisdiction other than Tennessee which, if committed in this state, would have constituted the crimes listed above. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used to determine what classification the offense is given.

D. "Current entertainer" means an entertainer performing sexually oriented entertainment within the metropolitan area as of March 1, 1999.

E. "Employee" means any and all persons, including independent contractors, who work in or at or render any services directly related to the operation of a sexually oriented business.

F. "Entertainer" means any person who provides live entertainment within a sexually oriented business as defined in this section, whether or not a fee is charged or accepted for entertainment and whether or not entertainment is provided as an employee or an independent contractor.

G. "Existing sexually oriented business," means a sexually oriented business that is operating within the metropolitan area as of March 1, 1999.

H. "Indecent exposure" means as defined in the Tennessee Code Annotated Section 39-13-511.

I. "Location" means a single site for which only one use and occupancy permit would be required.

J. "Metropolitan area" means the general services district of the metropolitan government of Nashville and Davidson County.

K. "Metropolitan council" means the legislative body of the metropolitan government of Nashville and Davidson County, Tennessee.

L. "New entertainer" means an entertainer not performing sexually oriented entertainment within the metropolitan area as of March 1, 1999.

M. "New sexually oriented business" means a sexually oriented business not in operation as of March 1, 1999.

N. "Obscenity" means as defined in the Tennessee Code Annotated Sections 39-17-961(10) through (14).

O. "Operator" means any person, partnership, or corporation operating, conducting or maintaining a sexually oriented business.

P. "Patronizing prostitution" means as defined in the Tennessee Code Annotated Section 39-13-512.

Q. "Promoting prostitution" means as defined in the Tennessee Code Annotated Section 39-13-512.

R. "Prostitution" means as defined in the Tennessee Code Annotated Section 39-13-512.

S. "Public indecency" means as defined in the Tennessee Code Annotated Section 39-13-511.

T. "Rape" means as defined in the Tennessee Code Annotated Section 39-15-503.

U. "Rape of a child" means as defined in the Tennessee Code Annotated Section 39-15-522.

V. "Sexual battery" means as defined in the Tennessee Code Annotated Section 39-15-505.

W. "Sexual exploitation of a minor" means as defined in the Tennessee Code Annotated Sections 39-17-1003, 39-17-1004 and 39-17-1005.

X. "Sexually oriented" means any exhibition of any motion pictures, films or videos depicting "specified sexual activities" or "specified anatomical areas" or any live performance, display or dance of any type, removal of articles of clothing or appearing unclothed, pantomime, modeling, or any other personal service offered customers a significant or substantial portion of which depicts any actual or simulated

performance of "specified sexual activities" or exhibition and viewing of "specified anatomical areas."

Y. "Sexually oriented business/establishment" means any commercial establishment which for a fee or incidentally to another service, regularly presents material or exhibitions distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation by patrons therein. "Sexually oriented business/establishment" also means any commercial establishment to which the public, patrons or members are invited or admitted and which are so physically arranged as to provide booths, separate from the common areas of the premises for the purpose of viewing sexually oriented motion pictures, sexually oriented movies, sexually oriented films or sexually oriented videos.

1. "Sexually oriented bookstore" means an establishment having a majority of its stock in trade or a majority of its floor space in books, magazines, other periodicals, or any other items which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation of the patrons therein; or in conjunction therewith has facilities arousal; for the presentation of sexually oriented entertainment, including but not limited to sexually oriented movies, sexually oriented videos, sexually oriented films, or sexually oriented live entertainment, for observation by patrons therein.

2. "Sexually oriented nightclub" means a theater, concert hall, auditorium, nightclub, bar, restaurant, or similar commercial establishment which regularly features live performances that are characterized by any actual a simulated performance of "specified sexual activities" or the exposure of "specified anatomical areas," as defined in this section.

3. "Sexually oriented theater" means an enclosed building regularly used for presenting films, motion pictures, videocassettes, slides, or other photographic reproductions or other material depicting, describing or relating to "specified sexual activities" or "specified anatomical areas," as defined in this section, for observation by patrons therein.

4. "Sexually oriented video store" means a commercial establishment having a majority of its stock or a majority of its floor space dedicated to "sexually oriented videos," as defined in this section, which are rented or sold or presented for a fee or incidentally to another service; or in conjunction therewith, regularly presents on the premises sexually oriented motion pictures or sexually oriented films, "sexually oriented videos;" or sexually oriented live exhibitions which are distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation by patrons therein.

a. "Sexually oriented videos" means a video, CD, laser disk, or similar medium with a cover that depicts "specified sexual activities" or "specified anatomical areas" or a transparent or less than opaque cover through which "specified sexual activities" or "specified anatomical areas" can be viewed.

Z. "Sexually oriented entertainment" means the regular presentation, for a fee or incidentally to another service, of material or exhibitions distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation by patrons therein.

AA. "Specified anatomical areas" means:

1. Less than completely and opaquely covered:

a. Human genitals, pubic region,

b. Buttocks,

c. Female breasts below a point immediately above the top of the areola; and

2. Human male genitals in a discernibly turgid state, even if completely opaquely covered. .

BB. "Specified sexual activities" means:

1. Human genitals in a state of sexual stimulation or

2. Acts of human masturbation, sexual intercourse or sodomy;

3. Fondling or erotic touching of human genitals, pubic region, buttock or female breasts.

CC. "Statutory rape" means as defined in the Tennessee Code Annotated Section 39-15-506. (Amdt 1 § 1 with Ord. 99-1503 §§ 1-3, 1999; Ord. 97-1022 § 1. 1997; amended during 9-97 supplement; Amdt 7 (part) and Amdt. 3 §§ 1 and 2 with Ord. 97-796 § 2 (part), 1997)

6.54.020 Sexually oriented business licensing board.

A. Establishment. A sexually oriented business licensing board is created and designated the metropolitan sexually oriented business licensing board (herein "board").

B. Membership-Terms.

1. The board shall consist of five members, who shall have been residents of the metropolitan area for not less than one year, and who shall continue to be eligible so long as they reside in the metropolitan area, to be appointed by the mayor and confirmed by a majority vote of the metropolitan council.

2. At least one of the five members shall be an attorney, and one of the five members shall be a health provider.

3. Of the five members first appointed, two shall be appointed for a term of two years, and two shall be appointed for a term of three years, and one shall be appointed for a term of four years. Thereafter, each member shall be appointed for a term of four years, and shall serve until his/her successor is appointed. Any vacancy other than the expiration of terms shall be filled for the unexpired term.

C. Election of Offices-Term. The board shall organize by the election of a chair and a vice-chair, who shall serve for a period of one year or until a successor shall have been chosen.

D. Meetings--Quorum Required-Minutes and Transcript.

1. The board shall hold two regular meetings each month at a time fixed by the board, and may hold such special meetings as may be necessary.

2. The attendance of at least a majority of the members of the board, not including unfilled positions, shall be required to constitute a quorum for the purpose of transacting business.

3. Minutes shall be kept of the meetings in permanent form and a record shall be kept of the action of the board with respect to every application for a license and/or a permit. The concurring vote of a majority of the members present and voting shall be necessary for the granting, revoking, suspending or any other action involving licenses or permits.

4. No transcript of the proceedings had before the board shall be in any form other than narrative, unless the board shall have been requested to provide for an exact copy of the testimony by an interested party at least twenty-four hours prior to a board meeting. The cost of an exact copy shall be borne by the person requesting the same.

E. Powers and Duties.

1. The board shall have jurisdiction over the licensing, regulating and controlling of all sexually oriented establishments as provided in this chapter, located in the metropolitan area.

2. The board may promulgate such bylaws, rules and regulations not inconsistent with state law, the Metropolitan Charter, or any ordinance, as it deems appropriate for the conducting of its business.

3. The board has the authority to subpoena witnesses to testify before the board.

F. Inspectors-Authority. The board is empowered to employ suitable person(s) as inspectors which inspectors shall not hold any civil service status. The board shall prescribe the duties of such inspectors so as to enforce the applicable provisions of this title.

G. Procedures for Hearings. This section shall apply to all hearings by the board including but not limited to hearings for revocation, suspension or denial of a license/permit.

1. Upon receiving a written request for a hearing, the board shall send the party requesting the hearing a notice stating the time and place of the hearing and the right to be represented by counsel.

2. At the hearing, the parry requesting the hearing shall appear on his/her own behalf or be represented by counsel. All witnesses shall be sworn. The chair shall allow the party requesting the hearing to present witnesses on his/her own behalf and to cross-examine all witnesses testifying against him/her.

3. All decisions of the board shall be in writing, setting forth the findings of the board, and shall be signed by the chair or vice-chair.

4. Minutes shall be kept of all proceedings before the board in permanent form and a record shall be kept of the actions of the board with respect to all hearings.

5. A record (which may consist of a tape or similar electronic recording) shall be made of all oral proceedings. The record must be maintained by the board for a period of ninety days. Such record or any part thereof shall be transcribed at the request of any party at such party's expense.

6. The board will arrange for a court reporter to be present at any hearing after an initial adverse administrative decision. (Amdt. 1 § 14 with Ord. 99-1503, 1999; Ord. 97-1022 § 3, 1997; Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.030 License required

A. Except as provided in subsection F of this section, from and after March 1, 1999, no sexually oriented business shall be operated or maintained within the metropolitan area without first obtaining a license to operate issued by the board.

B. Any person, partnership or corporation which desires to operate more than one sexually oriented business must have a license for each establishment.

C. Only one license may be issued for each sexually oriented business location.

D. No license or interest in a license may be transferred to any person, partnership or corporation.

E. It is unlawful for any entertainer or operator to knowingly work in or about, or to knowingly perform any service directly related to the operation of any unlicensed sexually oriented business. It is unlawful for any employee to knowingly work in or about, or to knowingly perform any service directly related to the operation of any unlicensed sexually oriented business while sexually oriented entertainment is being presented.

F. All existing sexually oriented businesses, as defined in Section 6.54.010, must submit an application for a license by March 15. 1999, or cease operations. All existing sexually oriented businesses which apply for a license by March 15, 1999, may continue to operate the sexually oriented business described in the application even if the board votes to deny the application where such denial is appealed to a court in accordance with Section 6.54.040(E)(3). All new sexually oriented businesses, as defined in Section 6.54.010, may submit an application at any time but may not operate until a license is granted except as permitted in Section 6.54.040(E)(4). (Ord. 99-1503 §§ 4, 5, 1999; Ord. 97-1022 § 5, 1997; Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.040 Application for license.

A. Application.

1. Any person, partnership, corporation or any other entity desiring to secure a license shall make application to the board. The applicant shall file the original application with six copies. The original application shall be dated by the board and held in the files of the board. A copy of the application shall be distributed the next business day by the board to: the police department, the department of codes administration, the health department, and the applicant.

2. Application forms shall be available at the office of the board.

3. The application form shall include all the information indicated in subdivisions (5a) through (5)(1) of this subsection.

4. The following persons must be listed in the license application for any sexually oriented business: any partner of a partnership who will participate in the day-to-day operation of the business, any officer or director of a corporate applicant, and any stockholder holding a majority controlling percentage of the stock of a corporate applicant and who will participate in the day-to-day operation of the business.

5. The applicant shall furnish the following information under oath:

a. Name and address of the applicant, including all aliases (business address is sufficient);

b. Proof of the applicant's date of birth demonstrating that the applicant is at least eighteen years of age;

c. All residential addresses of the applicant for the past three years (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature);

d. Whether the applicant previously operated in this or any other county, city or state under a sexually oriented

business license/permit or similar business license/permit. Whether the applicant has ever had such a license/permit revoked or suspended, within the last two years from the date of application, the reason therefor, and the business entity or trade name under which the applicant operated that was subject to the suspension or revocation;

e. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a misdemeanor violation that have occurred within the past two years. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a felony that have occurred within the past five years;

f. All judgements by a court within the past two years for violations of the metropolitan zoning Section 17.64.260;

g. Fingerprints and two photographs at least two inches by two inches of the applicant (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of asexual nature);

h. The address of the sexually oriented business to be operated by the applicant;

i. If the applicant is a corporation, the application shall specify the name of the corporation, the date and state of incorporation, the name and address of the registered agent and the name and address of all officers and directors of the corporation, and any stockholder holding a majority controlling percentage of the stock of a corporate applicant and who will be involved in the day-to-day operation of the business;

j. If the applicant is a partnership, joint venture, or any other type of business, the application shall specify the name and address of all persons who will be involved in the day-to-day operation of the business;

k. A statement by the applicant that he/she is familiar with the provisions of this chapter and is in compliance with them.

6. If the applicant intends to have booths on the premises for the purpose of viewing sexually oriented movies, sexually oriented films, or sexually oriented videos, then in addition, the applicant shall provide the board, with his/her application, a diagram, drawn to scale, of the premises including the location and layout of all booths and the location of the clerk/manager's stand or counter. Though the diagram shall be drawn to scale, it does not have to be professionally prepared.

B. Inspections and Investigations.

1. The codes department shall, upon receipt of a copy of the application, inspect the premises to insure that the establishment complies with the unique physical layout requirements set out in Section 6.54.050(A)(1) of this chapter. The health department shall inspect the premises to insure compliance with applicable health code statutes, ordinances, and regulations. The police department shall investigate the applicant's criminal history collecting the applicant's fingerprints and 2 x 2 photo either by performing these functions or by reviewing these items which were provided by the applicant and by performing a background investigation for crimes of a sexual nature. The results of both the inspections and the investigation shall be filed in writing with the board no later than twenty days after the date the application was filed with the board. Any inspection or investigation information not filed with the board in the time period specified shall not prevent the applicant from receiving the license and shall be treated by the board as if the report revealed no sexually oriented business/adult entertainment zoning code violations and/or no applicable criminal history. Subject to Section 6.54.150.

2. If a diagram is required to be submitted under subsection (A)(6) of this section, then the code inspector shall confirm the layout of the booths complies with the submitted diagram and the requirements set out in Section 6.54.050A.

3. The police department shall complete its investigation and the codes department and health department shall complete their respective inspections and shall communicate the results to the board in writing within twenty days of receipt of the application. The written investigation from the codes department and health department shall end with substantially one of the following statements:

The location at _____ complies with Chapter 6.54 and the applicable health code sections of the metropolitan code.

The location at _____ does not comply with Chapter 6.54 and the applicable health code sections of the metropolitan code. It is in violation of the following provisions: Section numbers of code violations.

The writing from the police department shall end with substantially the following statement:

The police department's criminal record check indicates that the persons listed on the application have/have not committed a crime of asexual nature within the past five years. The persons listed on the application have committed the following crimes of a sexual nature:

Name Crime Date

4. If the building/structure has a valid use and occupancy permit, the applicant shall provide the board with a copy of the valid use and occupancy permit which shall be made part of the file.

C. Board Action on Inspection and Investigation Results.

1. Within fifteen days of receiving the results of the investigation conducted by the police department and the inspections by the codes department, and health department the board will meet and determine if the applicant is in compliance with this code section and the applicable health statutes, ordinances and regulations.

2. If the board determines that the applicant is in compliance with the applicable health statutes, ordinances and

regulations, and the applicant has not committed a crime of a sexual nature, as defined in Section 6.54.010, is at least eighteen years of age, and has not given any false or misleading information on the application or omitted any material facts from the application, then the board shall grant the license. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

3. If the board fails to meet within the time period specified, or fails to have a quorum at the meeting, then the license shall be deemed approved and sent to the applicant by United States Mail to the address listed on the application.

4. In the event the board denied the application in accordance with Section 6.54.050(B)(2), such denial and the reason for the denial shall be mailed to the applicant the next business day after the board meeting reviewing the results of the investigation and inspections.

5. If it is determined by the board, using the application and the inspection reports that the applicant has violated the provisions of the zoning code applicable to sexually oriented/adult entertainment businesses within the past two years, then the applicant is ineligible for a license for one year from the date the citation was sustained. A violation of the zoning code shall be evidenced by a judgement of a court. The fact that the judgement is being appealed shall have no effect on the disqualification of the applicant until the judgement is reversed.

6. Any investigation reports or inspection reports not filed with the board in the time period specified in this section shall not prevent the applicant from receiving his/her license and shall be treated by the board as if that department approved the application.

7. If a diagram is required under subsection (A)(6) of this section and based on the code inspection, the board

determines that the actual structure does not comply with Section 6.54.050(A) or the submitted diagram, then the applicant is not in compliance with this code section and the license shall be denied in accordance with Section 6.54.050(A) and (B).

8. If in the course of the investigation it is discovered any false or misleading statement or information was given on the application, or material facts were omitted from the application, the board shall deny the application in accordance with Section 6.54.050(B)(3). False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

9. Within fifteen days of receiving the results of the investigation conducted by the police department and inspection reports from the codes department, and health department, if the board shall determine that the applicant is not in compliance with this code section, the zoning code or the applicable health statutes, ordinances and regulations, the applicant shall be notified in writing, the next business day, that the license is denied for failing to comply with applicable statutes, ordinances and regulations. This notice shall specify the violation. If the applicant can come into compliance as described in subsection D of this section, the denial shall not take effect. The notice shall also specify that the applicant may request a hearing within five days, cure the violation within fifteen days and request reinspection or request an extension of time.

10. The board has the discretion to hold any application for further investigation if: (a) the initial investigation requires investigation into out-of-state records; or (b) verification of out-of-state employment relating to a sexually oriented business or a sexually oriented business license/ permit or similar business license/permit is needed. Such additional investigation shall not exceed an additional ten days from the

end of the initial fifteen days specified in subsection (C)(1) of this section, unless otherwise agreed to by the applicant.

11. Whenever an application is denied or held for further investigation, the board shall advise the applicant in writing the next business day of the reasons for such action. Upon conclusion of the additional investigation, the board shall advise the applicant in writing the next business day whether the application is granted or denied. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

12. Failure or refusal of the applicant to give any information relevant to the investigation of the application, or his/her refusal or failure to appear at a reasonable time and place for examination under oath regarding such application or his/her refusal to submit to or cooperate with any investigation required by this chapter, shall constitute an admission by the applicant that he/she is ineligible for such license and shall be grounds for denial thereof by the board. This in no way requires the applicant to agree to additional time extensions beyond that allowed in subsection (C)(10) of this section.

D. Extensions of Time for the Applicant.

1. If the license is denied under subsection (C)(5) or (C)(7) of this section, the applicant may reinstate his/her application by notifying the board in writing that he/she has come into compliance and requests reinspection.

a. The applicant has fifteen days from the mailing of the denial described in subsection (C)(5) or (C)(7) of this section to cure the violation and notify the board or to request an extension pursuant to subsection (D)(2) of this section. The applicant has the responsibility to contact the board.

b. Once contacted, the board shall notify the appropriate inspector the next business day that the applicant believes he/she has come into compliance.

c. Upon notification by the board, the appropriate inspector shall return to the location for reinspection and shall submit another written report as indicated in subsection (B)(3) of this section. The inspector has five days from the date he/she was notified by the board to reinspect the premises and inform the board as to whether the applicant has come into compliance in the same manner described in subsection (B)(3) of this section and using the same language required in subsection (B)(3) of this section.

d. Based on the report of the inspector(s), the board shall determine if the applicant has come into compliance, and if so the board shall issue the license at the next regular meeting. The next meeting shall be held no later than fifteen days after the inspection report is filed with the board. Any inspections not filed with the board in the time period specified in this section will be treated as described in subsection (C)(6) of this section.

e. If the applicant fails to either contact the appropriate inspector to report that the code violations have been corrected, or if the code violations have not been corrected, then the application is denied in accordance with subsection (C)(5) or (C)(7) of this section.

2. If the process of curing the violation requires more time than that provided in subsection (D)(1) of this section, the applicant may request an extension from the board. If the applicant does not make such a request in the time allotted, the application is denied in accordance with subsections (C)(5), (C)(7) or (D)(3) of this section.

a. The request for an extension must be made in writing within five days from the denial described in subsection (C)(5) or (C)(7) of this section.

b. The board shall hear the applicant's request for an extension at the next regular meeting. The next meeting shall be held no later than fifteen days after the request for the extension is received by the board.

c. The hearing on the extension shall follow the same rules as set out in Section 6.54.020(G) except that the decision of the board shall grant or deny the extension and a decision to grant an extension shall take effect immediately.

d. An extension shall only be granted when the codes inspector and the health inspector agree that an extension will not endanger the health or safety of the community and the board determines that the applicant has demonstrated a good faith effort to make the necessary repairs or cure the violation(s) in a timely manner.

3. If the applicant fails to follow the procedure set out in this subsection then the application is denied and the applicant must reapply to obtain a license. Following the procedure set out in subsections (D)(1) or (D)(2) of this section requires no additional fees. Once the deadlines to cure the violation or ask for an extension of time have passed, the denial described in subsections (C)(5) and (C)(7) of this section shall be treated as a denial of the application.

E. Denial of the License Application.

1. When an application is denied, the applicant has the right to request a hearing within five days of the board's notification.

a. The request shall be in writing and filed with the board within five days of the board's decision.

b. The board shall hear all the evidence pertaining to the denial of the application at the next regular meeting. The next meeting shall be held no later than fifteen days after the request described above is mailed.

c. At the hearing, the applicant may present evidence as to why his/her application should not be denied. If the applicant fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board. Failing to appear before the board will not preclude the applicant's right to appeal any denial to the circuit or chancery courts of Davidson County.

d. The board shall affirm or reject the denial of the application at the hearing and in writing state the reasons for the board's decision.

e. The denial of the application shall be mailed by U.S. mail the next business day to the address of the applicant as listed on the application.

2. Any denial of an application for a license may be immediately appealed to the circuit or chancery courts of Davidson County. The metropolitan department of law may institute proceedings for a declaratory judgment. If the applicant chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within ten days from the date the metropolitan government was served with a petition for a writ of certiorari.

3. For an existing sexually oriented business, as defined in Section 6.54.010, any adverse administrative decision that is appealed to any court shall not take effect until that decision has been upheld by the court after adjudication on the merits. If the court fails to rule within forty days of the filing of an appeal, a license shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the license then that license shall be revoked in accordance with Section 6.54.150(A)(8). Adverse administrative decisions of the board, which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected parry time to seek judicial review.

4. For a new sexually oriented business, as defined in Section 6.54.010, any adverse administrative decision shall take effect the day the decision is issued by the board. If the adverse administrative decision is appealed to a court, and if the court fails to rule within forty days of the filing of an appeal, a license shall issue. When the court makes a determination after adjudication on the merits that upholds the

administrative denial of the license then that license shall be revoked in accordance with Section 6.54.150(Ax8). (Amdt. 1 §§ 2, 3 with Ord. 99-1503 §§ 6-30, 1999; Ord. 97-1022 §§ 6-39, 1997; amended during 9-97 supplement; Amdt. 6 § 5 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.050 Standards for issuance of license.

A. Physical Layout of Sexually Oriented Business.

1. Any sexually oriented business having available for customers, patrons or members any booth, for the viewing of any sexually oriented entertainment, including but not limited to sexually oriented films, sexually oriented movies, sexually oriented videos, shall submit a diagram under Section 6.54.040(A)(6) and the diagram submitted must be substantially the same as the structure observed by the inspector. Further, the structure and the diagram shall comply with the following requirements:

a. Access. Each booth shall be totally accessible to and from aisles and public areas of the sexually oriented business and shall be unobstructed by any door, gate, lock or other control-type devices.

b. Construction. Every booth shall meet the following construction requirements:

i. Each booth shall be separated from adjacent booths and any nonpublic areas by a solid or opaque wall;

ii. Have at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying same;

iii. All walls shall be solid and without any openings, extended from the floor to a height of not less than six feet and be light colored, nonabsorbent, smooth textured and easily cleanable;

iv. The floor must be light colored, nonabsorbent, smooth textured and easily cleanable; and

v. The lighting level of each booth shall be a minimum of ten footcandles at all times as measured from the floor.

c. Occupants. Only one individual shall occupy a booth, at any time. No occupant of a booth shall engage in any type of copulation, masturbation or the display of specified anatomical areas as defined herein or cause any bodily discharge of urine, feces or semen while in the booth. No individual shall damage or deface any portion of the booth.

2. The provisions enunciated in subdivision 1 of this subsection shall not apply to bathrooms unless the bathroom contains any equipment which would allow the viewing of sexually oriented films, sexually oriented movies, sexually oriented videos.

B. Applicant.

1. To receive a license to operate a sexually oriented business, an applicant must meet the following standards:

a. If the applicant is an individual, the applicant shall be at least eighteen years of age;

b. If the applicant is a corporation, all officers, directors and stockholders required to be named under Section 6.54.040(A)(5)(i) shall be at least eighteen years of age;

c. If the applicant is a partnership, joint venture, or any other type of organization where two or more persons have a financial interest, all persons having a financial interest in the business and who are involved in the day-to-day operation of the business shall be at least eighteen years of age.

2. No individual applicant, no officer, director or stockholder required to be named under Section 6.54.040(A)(5)(i) and no partners required to be named under Section 6.54.040(A)(5)(j) convicted of a crime of a sexual nature, as defined in Section 6.54.010, in any jurisdiction shall be eligible to receive a license for the time period described below.

a. If the conviction was for a misdemeanor violation, then the applicant shall be ineligible to receive a permit for two years from the date of the conviction.

b. If the conviction was for a felony violation, then the applicant shall be ineligible to receive a permit for five years from the date of the conviction.

c. The time is computed from the date of the conviction by the trial court to the date of the application. The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant until the trial court's conviction is reversed.

3. The applicant shall not have given any false or misleading information on the application, or omitted any material facts from the application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

a. If the applicant gave any false or misleading information or omitted any material facts, then the applicant shall be ineligible to receive a license for one year from the date of the application which contained the misleading statements or omissions unless the omission or misleading statement referred to the age of the applicant or to a crime of a sexual nature, as defined in Section 6.54.010.

b. If the misleading statements or omissions referred to the age of the applicant, then the applicant shall not be eligible to receive a license until he/she is eighteen or until one year has passed from the date of the application which contained the misleading statements or omissions whichever is later.

c. If the misleading statements or omissions referred to a crime of a sexual nature, as defined in Section 6.54.010, then the applicant shall not be eligible to receive a license until the time period described in subsection (B)(2)(a) through (c) of this section has expired or until one year has passed

from the date of the application which contained the misleading statements or omissions, whichever is later.

d. If the misleading statements or omissions referred to violations of Section 17.36.260 of the zoning code, then the applicant shall not be eligible to receive a permit until the time period described in subsection (B)(5) of this section has expired or until one year has passed from the date of the application which contained the misleading statements or omissions, whichever is later.

4. An applicant having had a sexually oriented business/establishment license or similar license/permit revoked within the last year shall not be eligible for a license for one year from the date of revocation.

5. No applicant shall have been found to have previously violated Section 17.36.260 of the metropolitan zoning code applicable to sexually oriented/adult entertainment businesses, as evidenced by the judgement of a court within one year immediately preceding the date of the application. If such violations exist, the applicant shall be ineligible for a license for one year from the date the citation was sustained. The fact that a trial court's judgement is being appealed shall have no effect on the disqualification of the applicant until the trial court's judgement is reversed.

6. If the applicant plans to have or has booths, for the purpose of viewing sexually oriented motion pictures, sexually oriented movies, sexually oriented films, sexually oriented videos, then the booths must comply with the requirements set out in subsection A of this section. (Ord. 99-1503 §§ 31-49, 1999: Ord. 97-1022 §§ 40-45, 1997; amended during 9-97 supplement; Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.060 Permit required.

A. Except as provided in subsection B of this section, from and after March 1, 1999, no person shall be an entertainer in a

sexually oriented business within the metropolitan area without first obtaining a permit issued by the board.

B. All current entertainers, as defined in Section 6.54.010, wishing to continue to perform sexually oriented entertainment must submit an application for a permit by March 15, 1999. All current entertainers, who apply for a permit by March 15, 1999, may continue to perform sexually oriented entertainment even if the board votes to deny the application where such denial is appealed to a court in accordance with Section 6.54.070(D)(3). All new entertainers, as defined in Section 6.54.010, may submit an application at any time but may not perform sexually oriented entertainment until a permit is granted except as permitted in Section 6.54.070(D)(4). (Ord. 99-1503 § 50, 1999; Ord. 97-1022 §§ 46, 47, 1997; Amdt. 7 (part) and Amdt. 6 § 7 with Ord. 97-796 § 2 (part), 1997)

6.54.070 Application for permit.

A. Application.

1. Any person desiring to secure a permit shall make application to the board. The applicant shall file the original application with three copies. The original application shall be dated by the board and held in the files of the board. A copy of the application shall be distributed the next business day by the board to the Metropolitan Nashville police department and the applicant.

2. Application forms shall be available at the office of the board. Applicants may obtain their application from the codes department. Applicants must also submit with each application two 2 x 2 photos.

a. Background Check. All background checks shall be completed by the metropolitan police department. The police department may be notified of a need for a background check in two ways. The applicant brings her application, including one of the two photos to the police department and has her fingerprints taken at the police department. The police then

begin the background check and once completed, send the background check, application, fingerprint card, and photo to the office of the board. In the alternative, the applicant can obtain fingerprints as described below, turn into the board a complete application including, fingerprints and two photos and the board shall send the complete application to the police department requesting a background check. The police will return the complete application with the completed background check to the office of the board.

b. Fingerprints. The applicant may have his/her fingerprints completed by the police department or other qualified person.

c. Fees. If the applicant brings her application to the police department, the police department shall not charge the applicant any additional fee for fingerprinting or a background check. If the applicant has the fingerprinting performed without informing the police department that it is for his/her application for a sexually oriented entertainer permit, then the applicant may retain the receipts for the fingerprinting and give them to the codes department when the applicant files his/her application. The codes department shall subtract the expenses for the fingerprints from the one hundred dollar permit fee, and the applicant shall pay the difference. This same procedure applies if the applicant has his/her fingerprints taken by a qualified person other than the metropolitan police department. Photos can be taken by the codes department at no additional fee or the applicant may have his/her photo taken elsewhere.

3. The application form shall include all information indicated in subdivisions (4)(a) through (4)(h) of this subsection.

4. The applicant shall furnish the following information under oath:

a. Name and address including all aliases;

b. Proof of the applicant's date of birth demonstrating that the applicant is at least eighteen years of age;

c. All residential addresses of the applicant for the past three years (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature);

d. The applicant's height, weight, color of eyes, and hair (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature);

e. Whether the applicant previously entertained in this or any other county, city, or state under a sexually oriented business license/permit or similar business license/permit within the two last years. For whom the applicant was employed or associated at the time. Whether the applicant has had such a license/permit revoked or suspended within the two last years and the reason therefor and the business entity or trade name for whom the applicant was employed or associated at the time of such suspension or revocation;

f. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a misdemeanor violation that have occurred within the past two years. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a felony that have occurred within the past five years;

g. Fingerprints and two photographs at least two inches by two inches of the applicant (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature); and

h. A statement by the applicant that he/she is familiar with the provisions of this chapter and is in compliance with them.

B. Investigation. The police department shall investigate the applicant's criminal history by collecting the applicant's fingerprints and 2 x 2 photo either by performing these

functions or by reviewing these items which were provided by the applicant and by performing a background investigation for crimes of a sexual nature. The results of the investigation shall be filed in writing with the board no later than twenty days after the date the application was filed with the board. Any investigation information not filed with the board in the time period specified shall not prevent the applicant from receiving his/her permit and shall be treated by the board as if the report revealed no applicable criminal history. Subject to Section 6.54.150.

C. Board Action on the Investigation Results.

1. Within fifteen days of receiving the results of the investigation conducted by the police department the board will meet and determine if the applicant has not been convicted of a crime of a sexual nature, as defined in Section 6.54.010, has not had a similar type of permit/ license revoked in the last two years, is at least eighteen years of age, and has not given any false or misleading information on the application or omitted any material facts from the application then the board shall grant the permit. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

2. If the board fails to meet within the time period specified, or fails to have a quorum at the meeting, then the permit shall be deemed approved and sent to the applicant by United States mail to the address listed on the application.

3. In the event the board denied the application in accordance with Section 6.54.080, such denial and the reason for the denial shall be mailed to the applicant the next business day after the board meeting reviewing the results of the investigation.

4. Any investigation reports not filed with the board in the time period specified in this section shall not prevent the

applicant from receiving his/her permit and shall be treated by the board as if that department approved the application.

5. If in the course of the investigation it is discovered any false or misleading statements or information was given on the application, or material facts were omitted from the application, the board shall deny the application in accordance with Section 6.54.080. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

6. The board has the discretion to hold any application for further investigation if: (a) the initial investigation requires investigation into out-of-state records; or (b) verification of out-of-state employment relating to a sexually oriented business or the revocation of a sexually oriented business license/permit or similar business license/permit is needed. Such additional investigation shall not exceed an additional ten days from the end of the initial fifteen days specified in subsection (D)(1) of this section, unless otherwise agreed to by the applicant.

7. Whenever an application is denied or held for further investigation, the board shall advise the applicant in writing the next business day of the reasons for such action. Upon conclusion of the additional investigation, the board shall advise the applicant in writing the next business day whether the application is granted or denied.

8. Failure or refusal of the applicant to give any information relevant to the investigation of the application, or his or her refusal or failure to appear at a reasonable time and place for examination under oath regarding such application or his or her refusal to submit to or cooperate with any investigation required by this chapter, shall constitute an admission by the applicant that he/she is ineligible for such permit and shall be grounds for denial thereof by the board. This in no way requires the applicant to agree to additional

time extensions beyond that allowed in subsection (C)(6) of this section.

D. Denial of the Permit Application.

1. When an application is denied, the applicant has the right to request a hearing within five days of the board's decision.

a. The request shall be in writing and filed with the board within five days of the board's decision.

b. The board shall hear all the evidence pertaining to the denial of the application at the next regular meeting. The next meeting shall be held no later than fifteen days after the request described above is mailed.

c. At the hearing, the applicant may present evidence as to why his/her application should not be denied. If the applicant fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board. Failing to appear before the board will not preclude the applicant's right to appeal any denial to the circuit or chancery courts of Davidson County.

d. The board shall affirm or reject the denial of the application at the hearing and in writing state the reasons for the board's decision.

e. The denial of the application shall be mailed by U.S. mail the next business day to the address of the applicant as listed on the application.

2. Any denial of the application for a permit may be immediately appealed to the circuit or chancery courts of Davidson County. The metropolitan department of law may also initiate proceedings for a declaratory judgment. If the applicant chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within ten days from the date the metropolitan government was served with a petition for a writ of certiorari.

3. For any current entertainer, as defined in Section 6.54.010, any adverse administrative decision that is appealed to any court shall not take effect until that decision has been upheld by the court after adjudication on the merits. If the court fails to rule within forty days of the filing of an appeal, a permit shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the permit then that permit shall be revoked in accordance with Section 6.54.150(C)(8). Adverse decisions of the board, which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

4. For a new entertainer, as defined in Section 6.54.010, any adverse administrative decision shall take effect the day the decision is issued by the board. If the adverse administrative decision is appealed to a court, and if the court fails to rule within forty days of the filing of an appeal, a permit shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the permit then that permit shall be revoked in accordance with Section 6.54.150(C)(8).

E. The permit carried by the entertainer shall contain only the following information:

1. A photo identification as provided by the applicant;

2. A computer-generated number assigned to each applicant, corresponding to the file maintained on each applicant by the sexually oriented business licensing board: and

3. The applicant's date of birth as indicated on the application. (Amdt. 1 §§ 4-7 with Ord. 99-1503 §§ 51-64,1999; Ord. 97-1022 §§ 48-62, 1997; amended during 9-97 supplement; Amdt. 7 (part), Amdt. 6 § 5 (part) and Amdt 1 with Ord. 97-796 § 2 (part), 1997)

6.54.080 Standards for issuance of a permit.

A. Applicant. To receive a permit as an entertainer, an applicant must meet the following standards:

1. The applicant shall be at least eighteen years of age.

2. No applicant convicted of a crime of a sexual nature, as defined in Section 6.54.010, in any jurisdiction shall be eligible to receive a permit for the time period described below.

a. If the conviction was for a misdemeanor violation, then the applicant shall be ineligible to receive a permit for two years from the date of the conviction.

b. If the conviction was for a felony violation, then the applicant shall be ineligible to receive a permit for five years from the date of the conviction.

c. The time is computed from the date of the application to the date of the conviction.

3. The applicant shall not have given any false or misleading information on the application, or omitted any material facts from the application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

a. If the applicant gave any false or misleading information or omitted any material facts, then the applicant shall be ineligible to receive a permit for one year from the date of the application which contained the misleading statements or omissions unless the omission or misleading statement referred to the age of the applicant or to a crime of a sexual nature, as defined in Section 6.54.010. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

b. If the misleading statements or omissions referred to the age of the applicant, then the applicant shall not be eligible to receive a permit until he/she is eighteen or until

one year has passed from the date of the application which contained the misleading statements or omissions, whichever is later.

c. If the misleading statements or omissions referred to a crime of a sexual nature, as defined in Section 6.54.010, then the applicant shall not be eligible to receive a permit until the time period described in subsection (A)(2)(a) through (c) of this section has expired or until one year has passed from the date of the application which contained the misleading statements or omissions, whichever is later.

4. The applicant shall not have had a sexually oriented business permit/license or similar business permit revoked within the last year immediately preceding the application. (Amdt. 1 § 8 with Ord. 99-1503 §§ 65-70, 1999; Ord. 97-1022 § 63 (part), 1997)

6.54.090 Fees.

A. A license fee of five hundred dollars shall be submitted with the application for a license. If the application is denied, one-half of the fee shall be returned.

B. A permit fee of one hundred dollars shall be submitted with the application for a permit. If the application is denied, one-half of the fee shall be returned. (Ord. 97-1022 § 63 (part), 1997; Ord. 97-796 § 2 (part), 1997)

6.54.100 Display of license or permit

A. The license shall be displayed in a conspicuous public place in the sexually oriented business.

B. The permit shall be carried by or be accessible to the entertainer during that entertainer's working hours and shall be displayed upon request of any member of the police department, health inspector, or board inspector.

C. If the business for which a license was issued ceases to exist in that a majority of the business assets have been liquidated, or the business has closed and ceased operations, then the license shall be returned to the board and cease to be

valid. (Ord. 99-1503 §§ 67(2). 71, 1999; Ord. 97-1022 § 63 (part), 1997; Ord. 97-796 § 2 (part), 1997)

6.54.110 Renewal of license or permit

A. Every license/permit issued pursuant to this chapter will terminate at the expiration of one year from the date of issuance unless sooner revoked and must be renewed before operation the following year.

B. Any operator desiring to renew a license or any entertainer desiring to renew a permit shall make application to the board. The application for renewal must be filed not later than sixty days before the license/permit expires. The original application for renewal plus the number of copies listed in Section 6.54.040A or 6.54.070A shall be filed and dated by the board.

C. The board shall send a copy to the same departments who would receive a copy of the initial application. These departments shall process the application in the same manner and within the same time limits which apply to the initial application.

D. The board shall provide the applicant with a copy of the application from the previous year and a new application form.

E. The renewal form shall be the same form described in Section 6.54.040A for a license and Section 6.54.070A for a permit except as indicated below in subsection H of this section.

F. For a renewal, the applicant may fill out the new form in its entirety or fill in any information which has changed over the year and is now different than the information indicated on the application from the prior year. The renewal must also include an updated background check by the police department and an updated 2 x 2 photo. The renewal does not require resubmission of fingerprints submitted with the initial application. However, if new or additional persons are

involved in the day to day operation of the licensed business those persons must submit fingerprints as described above.

G. If the applicant chooses to only include information concerning items which have changed, he/she will swear to the accuracy of both the information contained in the renewal form and the information attached from the prior year.

H. The renewal application form shall be the same form described in Section 6.54.040A for a license or Section 6.54.070A for a permit except the final line shall state:

> I swear the information I have given in the application from 199____ is still accurate and any facts or circumstances which have changed are indicated in this application for a renewal of the license/permit
>
> _____
>
> signature of applicant

I. A license renewal fee of five hundred dollars shall be submitted with the application for renewal. In addition to the renewal fee, a late penalty of one hundred dollars shall be assessed against the applicant who files for a renewal less than sixty days before the license expires. If the renewal is denied, one-half of the fee collected shall be returned.

J. A permit renewal fee of one hundred dollars shall be submitted with the application for renewal. In addition to such renewal fee, a late penalty of fifty dollars shall be assessed against the applicant who files for renewal less than sixty days before the permit expires. If the renewal is denied, one-half of the fee shall be returned.

K. The application for a renewal is subject to the same rules and limitations as the initial application.

L. When an application for renewal is denied, the applicant has the right to request a hearing within five days of the board's decision.

1. The request shall be in writing and filed with the board within five days of the board's decision.

2. The board shall hear all the evidence pertaining to the denial of the renewal application at the next regular meeting. The next meeting shall be held no later than fifteen days after the request described above is mailed.

3. At the hearing, the applicant may present evidence as to why his/her renewal application should not be denied. If the applicant fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board. Failing to appear before the board will not preclude the applicant's right to appeal any denial to the circuit or chancery courts of Davidson County.

4. The board shall affirm or reject the denial of the renewal application at the hearing and in writing state the reasons for the board's decision.

5. The denial of the renewal application shall be mailed by U.S. mail the next business day to the address of the applicant as listed on the application.

6. Any adverse administrative decision regarding the renewal of a license/permit that is appealed to any court shall not take effect until that administrative decision has been upheld by the court after adjudication on the merits. If a court fails to rule within forty days of the filing of an appeal, a new license/permit shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the renewal for a license/permit then that license/permit shall be revoked in accordance with Section 6.54.150(A)(8) and (C)(8). Adverse decisions of the board which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

M. The denial of any renewal for a license/permit may be appealed to the circuit or chancery courts of Davidson County by the applicant. The metropolitan department of law may initiate proceedings for a declaratory judgment in the circuit or chancery court for Davidson County. If the applicant or the

permittee/licensee chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within ten days from the date the metropolitan government was served with the petition for a writ of certiorari. (Amdt. 1 § 9 with Ord. 99-1503 §§ 72, 73, 1999; Ord. 97-1022 §§ 63 (part), 64-68, 1997; amended during 9-97 supplement; Amdt. 7 (part) and Amdt. 6 § 5 (part) with Ord. 97-796 § 2 (part), 1997) .

6.54.120 Hours of operation

A. All sexually oriented businesses shall be closed between the hours of three a.m. and eight a.m. Monday through Saturday and between the hours of three a.m. and twelve noon on Sundays.

B. All public areas of every sexually oriented business shall be open to inspection at any time during normal business hours by the following departments: police, codes, board inspector, and health. (Ord. 99-1503 § 74, 1999; Ord. 97-1022 § 63 (part), 1997; Amdt. 7 (part) and Amdt. 6 § 8 with Ord. 97-796 § 2 (part), 1997)

6.54.130 Responsibilities of the operator.

A. An operator is responsible for the conduct of all entertainers while on the licensed premises and any act or omission of any entertainer constituting a violation of the provisions of this chapter shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended, renewed or a penalty assessed subject to the limits described in Section 6.54.150(E).

B. No employee on the premises for furthering the business, but not including independent contractors on the premises for repairs and construction, of a sexually oriented business shall allow any minor to loiter around or to frequent a sexually oriented business or to allow any minor to view sexually oriented entertainment as defined herein on the premises of a licensed business.

C. Every sexually oriented business shall be physically arranged in such a manner that the entire interior portion of any booths, wherein sexually oriented motion pictures, sexually oriented movies, sexually oriented films or sexually oriented videos are viewed, shall be visible from the common area of the premises having at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying same. Visibility shall not be blocked or obscured by doors, curtains, partitions. drapes, or any other obstruction whatsoever. Further, any wall forming any portion of the booths, shall be solid and without any openings, extended from the floor to a height of not less than six feet. This section shall be construed in conjunction with Section 6.54.050A.

D. It is unlawful to install enclosed booths for the purpose of viewing of sexually oriented motion pictures, sexually oriented movies, sexually oriented films, sexually oriented videos. The licensee shall be responsible for and shall provide that any booth, or area used for the purpose of viewing sexually oriented motion pictures, sexually oriented movies, sexually oriented films or sexually oriented videos shall be readily accessible at all times and shall be continuously open to view in its entirety.

E. A sign shall be conspicuously displayed in the common area of the premises, and shall read as follows:

> This Sexually Oriented Business is regulated by The Metropolitan Code of Nashville and Davidson County, Chapter 6.54 which provides that no customer shall be permitted to have any physical contact with any entertainer on the premises during any performance. All performances shall only occur upon a stage at least eighteen inches above the immediate floor level at least three feet from the nearest customer.

F. It shall be the duty of the operator, to ensure that the line of sight and view area between the common area and any booths remain unobstructed by any doors, walls, merchandise, display racks or other materials at any time that any patron is permitted access to any booth. Entertainers and employees, on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, shall not place any obstructions in front of any booths at any time that any patron is permitted access to any booth.

G. It shall be the duty of the operator and employees on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, to ensure that the illumination in booths, described in Section 6.54.050(A)(1)(b)(v) is maintained at all times that any patron is present on the premises.

H. No operator shall allow openings of any kind to exist between booths, and no person, including entertainers and employees shall make or attempt to make an opening of any kind between any booths.

I. The operator or his/her designee shall, during each business day, regularly inspect the walls between the booths, to determine if any openings or holes exist. If such openings exist it is the duty of the operator to repair the damage as soon as possible. No patron shall be permitted access to a booth, where an opening or a hole exists. It shall be the duty of the operator to ensure those booths are unoccupied by patrons until the opening is repaired or covered. (Amdt. 1 § 10 with Ord. 99-1503 §§ 75-84, 1999; Ord. 97-1022 §§ 63 (part), 69-73, 1997; Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.140 Prohibitions and unlawful sexual acts.

A. No operator, entertainer or employee on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, of a sexually oriented business shall permit to be performed, offer to

perform, perform or allow customers, employees or entertainers to perform sexual intercourse or oral or anal copulation or other contact stimulation of the genitalia on the premises.

B. No operator, entertainer or employee on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, shall encourage or permit any person upon the premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any entertainer, operator or employee.

C. No customer shall be permitted to have any physical contact with any entertainer on the licensed premises while the entertainer is engaged in a performance of live sexually oriented entertainment. All performances of live sexually oriented entertainment shall only occur upon a stage at least eighteen inches above the immediate floor level and removed at least three feet from the nearest customer. (Ord. 99-1503 §§ 85-87, 1999; Ord. 97-1022 § 63 (part), 1997; amended during 9-97 supplement; Amdt. 7 (part), Amdt. 6 §§ 3, 4 and Amdt. 4 with Ord. 97-796 § 2 (part), 1997)

6.54.150 Revocation or suspension of license/permit.

A. The board shall revoke a license for any of the following reasons:

1. Discovery that false or misleading information or data was given on an application, or material facts were omitted from an application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application;

2. The licensee was or has become ineligible to obtain a license under Section 6.54.050(B);

3. Any cost or fee required to be paid by this chapter is not paid;

4. The licensee knowingly employs, or with due diligence should have known that licensee was employing, an

entertainer who does not have a permit. The licensee knowingly provides, or with the exercise of due diligence should have known the he/she was providing, space on the premises whether by lease or otherwise to an independent contractor who performs or works as an entertainer without a permit;

5. The licensee sells, furnishes, gives, displays, or causes to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the licensed premises. The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent, the licensee's employee, who is on the premises furthering the business of the licensee, from selling, furnishing, giving, displaying, or causing to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the licensed premises.

The licensee knowingly allows, or through the exercise of due diligence should have been able to prevent, an entertainer to sell, furnish, give, display, or cause to be sold, furnished given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the licensed premises;

6. The licensee knowingly denies, or through the exercise of due diligence should have known that he/she was denying, access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold.

The licensee knowingly allows, or through the exercise of due diligence should have been able to prevent, his/her employee, who is on the premises furthering the business of the licensee, to deny access to law enforcement personnel during business hours to any portion of the licensed premises

wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold.

The licensee knowingly allows, or through the exercise of due diligence should have been able to prevent an entertainer to deny access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold;

7. The attempted transfer of a license or any interest in a license;

8. If an application for a license or a renewal of a license was denied and that administrative denial was appealed and upheld by a court after adjudication on the merits then that license shall be revoked on the effective date of the court's judgement.

9. The licensee fails to maintain the licensed premises in a sanitary and safe condition by allowing continuing violations of Chapter 6.54.

A continuing violation shall mean more than two judgements from the board, unless the decision of the board is appealed and overturned, that the licensee violated Chapter 6.54 within a twenty-four-month period, not including any period of suspension. The fact that the board's judgment is being appealed shall have no affect on the determination that the violation has been continuing until such time as the judgment of the board is reversed.

The licensee may affirmatively prove as a defense to an alleged violation of Chapter 6.54 that the licensee did not know, or through the exercise of due diligence could not have known that his/her employees' acts or an entertainer's acts would violate Chapter 6.54. If the licensee knew or should have known that his/her employees' acts or an entertainer's acts were violating any subsection of Chapter 6.54, the

licensee may still affirmatively prove as a defense to the violation that the licensee was powerless to prevent the continuing unsafe or unsanitary condition.

10. Continuous Violations of Tennessee Code Annotated. Section 57-4-204 or Metropolitan Code Section 7.24.030. Continuous violations shall mean that the licensee had more than two judgements entered against him/her for violating Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four month period, not including periods of suspension. The fact that the trial court's judgement is being appealed shall have no effect on the revocation until such time as the judgement of the trial court is reversed.

B. The board shall either fine, suspend or fine and suspend a license for any of the following reasons, that are not sufficient grounds for revocation:

1. The licensee fails to maintain the licensed premises in a sanitary or safe condition by allowing a violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030.

The licensee may affirmatively prove as a defense to an alleged violation of Chapter 6.54, Tennessee Code Annotated Section 574-204 or Metropolitan Code Section 7.24.030 that he/she did not know, or through the exercise of due diligence could not have known of his/her employee's acts or omissions or an entertainer's act or omissions. If the licensee knew or should have known that his/her employee or an entertainer was violating any such subsection of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030, the licensee may still affirmatively prove as a defense to the alleged violation that he/she was powerless to prevent the unsafe or unsanitary condition.

2. Upon the first violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four-month period, not

including periods of suspensions, the licensee shall either be fined five hundred dollars or his/her license shall be suspended for a period no less than five days and no longer than thirty days or the licensee shall be both fined five hundred dollars and his or her license suspended for a period of not less than five days and no longer than thirty days.

3. Upon the second violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four-month period, not including periods of suspensions, the license shall be suspended no less than thirty-one days and no longer than ninety days.

A second violation of Chapter 6.54, shall mean a prior judgement from the board, unless the decision of the board is appealed and overturned, that the licensee violated Chapter 6.54 within a twenty-four-month period, not including any period of suspension. The fact that the board's judgment is being appealed shall have no affect on the determination that the violation occurred previously until such time as the judgment of the board is reversed.

A second violation of Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 shall mean judgment from a trial court that the license violated Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030. The fact that a trial court's judgment is being appealed shall have no affect on the suspension and the judgment shall be treated as a violation until such time as the judgment of the trial court is reversed.

C. The board shall revoke a permit for any of the following reasons:

1. Discovery that false or misleading information or data was given on any application, or material facts were omitted from any application. False or misleading information does not include information which the applicant reasonably

believed, after exercising due diligence, was correct at the time of the application;

2. The permittee has become ineligible to obtain a permit under Section 6.54.080A;

3. Any cost or fee required to be paid by this chapter is not paid;

4. The permittee provides sexually oriented entertainment on the premises of an operator who he/she knows, or with the exercise of due diligence should have known, does not have a license;

5. The permittee knowingly, or with the exercise of due diligence should have known that he/she, sells, furnishes, gives. displays, or causes to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the premises;

6. The permittee knowingly denies, or through the exercise of due diligence should have known that he/she was denying, access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold;

7. The permittee attempted to transfer his/her permit or any interest in his/her permit to someone else;

8. The application for a permit or the application for the renewal of a permit was denied and that administrative denial was appealed and upheld by a court after adjudication on the merits;

9. The permittee repeatedly fails to comply with the provisions of Chapter 6.54. Repeatedly fails to comply shall mean that the permittee has been found by the board to have violated Chapter 6.54 more than twice within a period of twenty-four months, not including any period of suspension. The fact that the board's judgment is being appealed shall have no affect on the determination that the permittee has

repeatedly failed to comply until such time as the judgment of the board is reversed.

D. The board shall suspend a permit for any of the following reasons that are not grounds for revocation:

1. The permittee violates Chapter 654, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030.

2. Upon the first violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four-month period, not including periods of suspensions, the permittee shall either be fined five hundred dollars or his or her permit shall be suspended for a period no less than five days and no longer than thirty days or the permittee shall be both fined five hundred dollars and his or her permit suspended for a period of no less than five days and no longer than thirty days.

Upon the second violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four-month period, not including periods of suspensions, the permit shall be suspended no less than thirty-one days and no longer than ninety days.

E. The board shall follow the following procedure for revoking or suspending a license or a permit.

1. Before revoking or suspending any license or permit the board shall give the operator or entertainer five days' written notice of the alleged violation(s) against him/her. In such cases the charges shall be specific and in writing except under Section 6.54.150(A)(7), (8) and Section 6.54.150(C)(7), (8) of this chapter.

2. The board shall hear all the evidence pertaining to the revocation or suspension at the next regular meeting. The next meeting shall be held no later than fifteen days after the notice described above is mailed. The licensee/permittee may

present evidence bearing upon the question of suspension/revocation.

3. If the licensee/permittee fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board on the citation. Failing to appear before the board will not preclude the licensee's/permittee's right to appeal any revocation/suspension to the chancery court of Davidson County.

4. If the licensee/permittee requests a hearing, the license/permit shall remain in effect and valid during the appeal to the board until such time as the hearing is held.

5. Any adverse administrative decision to suspend or revoke a license/permit that is appealed to the circuit or chancery courts of Davidson County shall not take effect until that administrative decision has been upheld by the court after adjudication on the merits. Adverse decisions of the board which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

6. The revocation/suspension of a license/permit may be appealed to the circuit or chancery courts of Davidson County by the licensee/permittee. The metropolitan department of law may initiate proceedings for a declaratory judgment in the circuit or chancery court for Davidson County. If the permittee/licensee chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within seven days from the grant of the writ of certiorari.

F. Any operator or entertainer whose license or permit is revoked shall not be eligible to receive a license or permit for one year from the date of revocation. (Amdt 1 § § 11-13 with Ord. 99-1503 § 88, 1999)

6.54.160 Penalties and prosecutions.

A. Any individual, partnership or corporation violating any of the provisions of this chapter shall be subject to any of the following penalties:

1. Five hundred dollars for each offense; and/or

2. A suspension of any license/permit for a specified period of time for each offense listed in Section 6.54.150B or D; or

3. Revocation of any license/permit for any conduct listed in Section 6.54.150A or C.

B. The penalty of suspension may not be combined with revocation. A fine alone can be a penalty or it may be combined with a suspension.

C. Each violation of this chapter shall be considered a separate offense and any continuing violation shall be considered a separate offense for each day of the violation. (Ord. 99-1503 § § 89, 90, 1999; Ord. 97-1022 § 63 (part), 1997; Ord. 97-796 § 2 (part), 1997)

6.54.170 Invalidity of part.

Should any court of competent jurisdiction declare any section, clause or provision of this chapter to be unconstitutional, or any other ordinance of the metropolitan government unconstitutional, such decision shall affect only such section, clause, provision or ordinance so declared unconstitutional, and shall not affect any other section, clause or provision of this chapter. (Ord. 97-1022 § 63 (part), 1997; Ord. 97-796 § 2 (part), 1997)

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In The

# Supreme Court of the United States

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, AND EMMITT TURNER, CHIEF OF POLICE OF THE METROPOLITAN POLICE DEPARTMENT,

*Petitioners,*

v.

DEJA VU OF NASHVILLE, INC., et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Sixth Circuit Court of Appeals found that Chapter 6.54 of the Metropolitan Code of Nashville and Davidson County lacks the required prompt judicial review by failing to guarantee access to state courts. The question of whether the prompt judicial review component requires prompt judicial access or prompt judicial determination played little if any role in the court's decision. Because the only available "appellate" remedy available in the State of Tennessee is the discretionary common law writ of certiorari, the ordinance fails under even the less restrictive access definition of the prompt judicial review requirement. As such, this case presents the question of whether a discretionary review procedure satisfies the prompt judicial review requirement, without regard to whether that requirement mandates prompt determination or merely prompt access to the courts.

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Deja Vu of Nashville, Inc., Michael Rucker, Michael Butler, Meroney Entertainment, Inc., the Pleasure Palace, Inc., Dawn Pierce, Elizabeth Martz, the 822 Corporation and 421 Corporation (collectively "Respondents"), respectfully request that this Court deny the Petition for a Writ of Certiorari filed by the Metropolitan Government of Nashville and Davidson County and Emmett Turner to review the judgment of the United States Court of Appeals for the Sixth Circuit rendered in this case.

## ADDITIONAL RELEVANT STATUTORY PROVISIONS

In addition to the constitutional, statutory, and ordinance provisions reproduced in the appendix to the Petition, Respondents submit here the Tennessee common law writ of certiorari statute found at Tenn. Code Ann. §27-8-101 (Opp. App. 1a),[1] the Tennessee statutory writ of certiorari provision appearing at Tenn. Code Ann. §27-8-102 (Opp. App. 1a), Tenn. Code Ann. §57-4-204 (Opp. App. 19a-22a), and Metropolitan Code Section 7.24.030 (Opp. App. 22a-25a).

[1] As used herein, "Pet. App. xxx" refers to pages of the appendix accompanying the Petition, and "Opp. App. xxx" refers to pages of the appendix attached hereto.

## STATEMENT IN OPPOSITION

If this Court is searching for a case to resolve the question of whether the "prompt judicial review" component of *Freedman v. Maryland*, 380 U.S. 51 (1965) requires a prompt judicial determination on the merits or merely "prompt judicial access," this is not it.

The Ordinance at issue here guarantees neither a prompt judicial determination of the propriety of the government's actions nor prompt access to a judicial forum. Adverse decisions of the sexually oriented business licensing board ("Board") made pursuant to Chapter 6.54 are reviewable only upon the issuance of a common law writ of certiorari. This procedure is inherently flawed in at least three respects. First, because the issuance of the writ is discretionary in nature, aggrieved applicants and license holders are not guaranteed access to a judicial forum. Second, even if the writ is ultimately accepted and judicial access is granted, the court is not required to issue a decision as to whether to review a particular case within a specific and reasonable period of time. The court could conceivably delay ruling upon a petition for writ of certiorari indefinitely, during which time the applicant's First Amendment rights are continually violated. Third, even if a writ of certiorari is promptly issued, the court is precluded from providing adequate judicial review because it cannot review the intrinsic correctness of a decision.

Given these flaws, the judicial review provisions contained in Chapter 6.54 do not constitute an adequate and appropriate mechanism of prompt judicial review, regardless of how the words "prompt" and "review" are

defined. This was, indeed, the focus of the Sixth Circuit's ruling and not the question of whether prompt judicial review requires prompt determination or mere access. Therefore, not only does this case constitute an inadequate vehicle to resolve any conflict amongst the circuits, but that dispute may well never be reached by this Court should it elect to review the Sixth Circuit's decision.

In addition, Petitioner overstates the disparity between circuit rulings addressing the construction of the phrase "prompt judicial review." A number of the decisions that Petitioner relies on to establish a conflict actually involved content-neutral time, place, and manner restrictions similar to those at issue in *Thomas v. Chicago Park District*, 122 S.Ct. 775 (2002). Because such restrictions are not required to contain the *Freedman* procedural guarantees generally necessary for targeted adult business regulations to pass constitutional muster, *Thomas*, 122 S.Ct. at 780, n.2, there is no circuit conflict between those decisions and the ruling of the Sixth Circuit here.

## REASONS THAT THE PETITION SHOULD BE DENIED

### I. THE DECISION OF THE SIXTH CIRCUIT WAS PREDICATED UPON THE FACT THAT THE "JUDICIAL REVIEW" AFFORDED BY CHAPTER 6.54 AND TENNESSEE LAW IS DISCRETIONARY IN NATURE.

Petitioner appropriately acknowledges here, as it has throughout the entirety of these legal proceedings, that the potentially available "judicial review" of an adverse

administrative decision by the Board is by way of a "common law writ of certiorari from a state trial court." Petition, p. 4, *citing*, Ord. §§.040(E)(2),[2] .070(D)(2), .110(M), and .150(E)(6). *See also, Deja Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville and Davidson Cty., Tenn.*, 274 F.3d 377, 401 n.6 (6th Cir. 2001) (Metro acknowledging at oral argument in the Sixth Circuit that the provisions of Chapter 6.54 only authorize review "via the common law writ"). Petitioner admits that the Metropolitan code does not "guarantee that the appeal will be decided by a date certain." Petition, p. 2. In fact, Chapter 6.54 and the overlying Tennessee statute of common law certiorari does not even guarantee that any form of judicial review will be provided *at all*.

The Tennessee "common law" writ of certiorari is found in Tenn. Code Ann. 27-8-101. Opp. App. 1a. Pursuant to that statute, a court has the absolute discretion to deny a petition for issuance of the writ, and never then reach the merits of the issues sought to be reviewed.

"[W]hether the common law writ of certiorari will issue is a matter of discretion. It is not issued as a matter of right." *Boyce v. Williams*, 389 S.W.2d 272, 277 (Tenn. 1965). *See also, Clark v. Metropolitan Gov't of Nashville*, 827 S.W.2d 312, 316-17 (Tenn. App. 1991) ("the remedy of certiorari is not available as of right, but is granted under *unusual or extraordinary circumstances*. It is instituted by an application to a court of competent jurisdiction which

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[2] The designation of "Ord. §.xxx" specifies particular provisions of Chapter 6.54. The sections and subsections referred to are found in the version of that Ordinance which are reproduced at Pet. App. 130a-176a.

may *or may not* authorize the writ") (emphasis added). And, the Petitioner acknowledges this discretionary nature of the common law writ. *See*, Petition, p. 4 ("*If* the trial court grants the writ, and thus determines to consider the appeal . . . ") (emphasis added).

In addition, not only is granting of the writ discretionary, but there is no time limit for a court to decide upon whether to grant the petition or not, and then review the merits of the dispute. Tenn. Code Ann. §27-9-111(e) (Pet. App. 129a).[3] Accordingly, Chapter 6.54, together with the common law writ, does not even provide prompt *access* to a judicial forum. It is *this aspect* of Chapter 6.54 and Tennessee law which served as the lynchpin of the Sixth Circuit ruling, and not any determination as to whether "prompt judicial review" necessitated a prompt judicial determination or merely mandated prompt access to a court. *Deja Vu of Nashville*, 274 F.3d at 401-02 (the appellate court referring to the discretionary nature of the common law writ as the "*biggest problem* with the Ordinance's judicial review provision") (emphasis added).

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[3] Petitioner states that the Metropolitan Government "has no power to require a state court to grant a writ of certiorari or to act on an appeal by any particular date." Petition, p. 4. While technically true, that statement is not, as they say, accurate. After the District Court issued its first preliminary injunction enjoining Chapter 6.54 for failing to comply with the *Freedman* procedural guarantees, Metro successfully lobbied for the Tennessee Legislature to enact what is the current version of Tenn. Code Ann. §27-9-111(e). That statute does, of course, compel a court "to act on an appeal by . . . [a] particular date." Pet. App. 129a.

## II. THE SCOPE OF REVIEW UNDER THE TENNESSEE COMMON LAW WRIT OF CERTIORARI IS FAR TOO NARROW TO AFFORD ADEQUATE PROTECTIONS TO FIRST AMENDMENT PROTECTED ACTIVITIES.

Simply put, the Tennessee common law writ of certiorari is not *appellate* review at all. *See, Helton v. State*, 250 S.W.2d 540, 541 (Tenn. 1952), *quoting, State ex rel. McMurrow v. Hunt*, 192 S.W. 931, 933 (Tenn. 1917) (the supervisory powers of Tennessee Courts to issue a common law writ of certiorari "should not be confounded with its appellate jurisdiction").

> *The writ has never been employed to inquire into the correctness of the judgment rendered where the court had jurisdiction, and was therefore competent.* Hence, it has been held that the supervisory jurisdiction of the court on a certiorari must be restricted to an examination into the *external validity* of the proceedings had in the lower court. *It cannot be exercised to review the judgment as to its intrinsic correctness, either on the law or on the facts of the case.*

*Helton*, 250 S.W.2d at 540-41 (emphasis added).

Accordingly, "[t]he scope of review under the common law writ . . . is *very narrow*. It covers only an inquiry into whether the board has exceeded its jurisdiction or is acting illegally, fraudulently, or arbitrarily. . . . " *Powell v. Parole Eligibility Review Board*, 879 S.W.2d 871, 873 (Tenn. App. 1994), *appeal denied* (June 20, 1994) (emphasis added). "At the risk of oversimplification, one may say that it is not the correctness of the decision that is subject to judicial review, but the *manner* in which the decision is

reached. If the agency or board has reached its decision in a constitutional or lawful manner, then the decision would *not* be subject to judicial review." *Id.* (emphasis added).[4]

This limited inquiry under Tennessee law is not the form of appellate review that this Court has mandated in order to insure that First Amendment rights are not trampled upon by an overzealous government. *Cf., FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 228 (1980) (The First Amendment requires that there be "prompt judicial review in the event that the license is *erroneously denied*") (emphasis added). And, the actions of the Board here well illustrate that the Tennessee common law writ of certiorari is not the type of "sensitive tool" necessary to protect First Amendment rights from governmental infringement, regardless of *when* that judicial review may ultimately be provided.

After the District Court lifted the first preliminary injunction (concluding that Metro had "fixed" the *Freedman* procedural issues), the adult businesses in Nashville and Davidson County were then required to undergo the licensing process of Chapter 6.54. Of the *eighteen* businesses that filed applications, only *three* were initially granted licenses by the Board. Deja Vu's application was

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[4] *Accord, Yokley v. State,* 632 S.W.2d 123, 125 (Tenn. App. 1981), *cert. denied,* November 30, 1981 (an erroneous decision is not an illegal decision, and a court may not substitute its decision for that of an inferior board "regardless of how erroneous the decision of the Board may have been"); and *Henry v. Board of Claims,* 638 S.W.2d 825, 827 (Tenn. App. 1982) (*appeal denied* September 7, 1982) ("an erroneous decision of the Board, absent more, is not an illegal, arbitrary, or fraudulent decision").

denied based upon a conclusion by the Board that the establishment needed to clean a number of couches, restroom walls, fixtures and shower stalls; repair a commode; and provide covered waste containers. Opp. App. 11a-13a. The Board also concluded that the application should be denied because an inspector had asserted that entertainers were in violation of a three-foot dancer/patron buffer zone restriction[5] as contained in Chapter 6.54. *Id.*

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[5] Petitioner is therefore incorrect when it asserts that initial "decisions regarding the issuance, renewal, and revocation of licenses are made at the administrative level by the Metropolitan Government based on criteria *unrelated to the content of any speech.*" Petition, p. 3 (emphasis added), *citing*, Ord. §§.040(C)(2), .110(K), .150(A)(1)-(10). Also illustrating the erroneous nature of this statement is the fact that a license application can be denied, and an issued license suspended or revoked, predicated specifically upon the content of expression, such as violations of obscenity, indecent exposure and public nudity laws, or even the "performance standards" of Chapter 6.54 itself (Ord. §.140). *See, e.g.*, Ord. §§.050(B)(3) and (4), .080(A)(2) and (4), .150(A)(9) and (10) (the provisions of Tenn. Code Ann. §57-4-204 described in subsection 10 is found at Opp. App. 19a-22a, and "Metropolitan Code section 7.24.030" is reproduced in Opp. App. 22a-25a, with §.030(C) clearly illustrating that revocation and/or suspension of a license can be specifically predicated upon the "*content*" of expression), and .150(B)(1). In addition, there will certainly be instances where the Metropolitan Government asserts that a business is subject to Chapter 6.54, although the owners and operators of the establishment contend to the contrary. In that circumstance, the Board will clearly be required to evaluate the *content* of the expression in order to determine whether the business presents one or more of the types of entertainment which are defined to be required to comply with the Ordinance. *See, e.g.*, Ord. §§.010(Y)(1), (2), (3), and (4), (Z), (AA) and (BB).

Other establishments suffered similar fates. A business known as the "Pleasure Palace" had its application denied due to the alleged need to repair a hand sink, clean some walls, air conditioning vents and storage areas, and to provide for hand towels (Opp. App. 13a-15a); Club Platinum's application was denied because it allegedly needed to repair a toilet, clean showers, and "eliminate storage that may attract rodents and insects" (Opp. App. 16a-17a); and the Executive Club had its application denied because the Board felt that it needed to repair a couch, clean the restroom floors, and provide covered trash cans (Opp. App. 17a-18a).

Implicating no constitutional or procedural issues whatsoever, if the applicants desired to seek to have a court overturn these decisions, they would strictly have to attack the *intrinsic correctness* of the administrative rulings;[6] an aspect of review that is specifically *precluded*

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[6] A similar example of this problem would be presented in the circumstance where the Board, in invoking one of the "civil disability" provisions of the Ordinance, decided to deny an application for a license based upon an alleged criminal conviction or Ordinance violation of the applicant. *See, e.g.*, Ord. §.050(B)(2). If the applicant, however, contended that the Board had simply "gotten the wrong guy," and that he in fact had not been convicted of a disabling crime, that person would be precluded under the Tennessee common law writ from seeking judicial redress in an effort to correct that erroneous decision. And, the Petitioner is incorrect when it contends that a writ of certiorari must be issued "when an administrative ruling prohibits speech activities." Petition, p. 10 n.8. An erroneous ruling does not a constitutional violation make. *See, e.g., Powell*, 879 S.W.2d at 873 (error in calculating a prisoner release eligibility date, which therefore arguably led to a violation of

under the Tennessee common law writ of certiorari.[7] These factually driven license application denials would simply then be *immune* from review under the common law writ.

Therefore, regardless of any consideration of the *timing* of judicial review, the mere limited scope of the Tennessee common law writ establishes that it fails to comply with this Court's rulings in regard to the mandatory nature of available judicial review. In fact, this Court

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the petitioner's equal protection and due process rights under the Constitution, was *not* reviewable by a common law writ).

[7] The limited nature of review of the common law writ should be contrasted with the broader *appellate* review as provided by the *statutory* writ of certiorari found in Tenn. Code Ann. §27-8-102 (Opp. App. 1a). Unlike the common law writ, the statutory writ *is* "a substitute for appeal." Tenn. Code Ann. §27-8-102(3). More importantly, while the common law writ is discretionary, *see* discussion, *supra*, and Tenn. Code Ann. §27-8-101 ("the writ of certiorari *may* be granted . . . "), the statutory writ contains no such limitation ("certiorari *lies* . . . as a substitute for appeal"). As one commentator summed it up, "in order to obtain a broader scope of review, the statutory writ of certiorari must be utilized," and that "the statutory writ of certiorari provides a de novo review of both law and facts; therefore, *it is the favored procedure.*" Mark Guthrie, *Methods of Judicial Review Over Administrative Actions in Tennessee*, 13 Memphis St. Univ. L.Rev. 657, 666 (1983) (emphasis added). *See also, Enochs v. Narren*, 949 S.W.2d 686, 688 (Tenn. App. 1996), *appeal denied* (May 27, 1997) (statutory writ of certiorari involved some type of trial de novo). The Metropolitan Government could easily have provided for review by the statutory as opposed to the common law writ, but not having done so, this challenged ordinance is certainly then constitutionally infirm regardless of whether the "judicial review" that it provides for is "prompt."

reviewed the Tennessee system of appeals from administrative decisions in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), and concluded that the procedures were unconstitutional because state courts did not timely "review the *merits* of the decision." *Id.* at 561-62 (emphasis added).

## III. THE PETITIONER'S ABANDONMENT OF A FUNDAMENTAL TENANT OF ITS ARGUMENT BELOW DOES NOT SERVE TO OBVIATE THE REALITY THAT CHAPTER 6.54 FAILS TO GUARANTEE JUDICIAL REVIEW OF AN ADVERSE ADMINISTRATIVE RULING, IRRESPECTIVE OF WHETHER SUCH RELIEF IS AFFORDED PROMPTLY OR NOT.

Perhaps recognizing the fact that the majority of petitions by aggrieved applicants will be denied by courts because they do not raise questions of whether the administrative board exceeded its jurisdiction or acted illegally, fraudulently, or arbitrarily, the Petitioner abandons in this Court a position that it has consistently maintained over the past four plus years of litigation. Specifically, Petitioner now contends for the first time that if a trial court declines to grant the petition for a writ of certiorari, the "adult business prevails as a matter of right." Petition, p. 10. And, Petitioner acknowledges it is now taking a position inconsistent with its arguments below. Petition, p. 6 n.6.

This revised "position" should be contrasted with the claim that the Petitioner first raised as far back as 1998, when in a hearing before the District Court, counsel for the Petitioner succinctly stated:

> Let me go back to the Court's first question, what would happen if the writ of cert. was denied. *Case law is clear in Tennessee, a denial of a writ of cert. is a decision on the merits . . .* [and] *the stay would be lifted. . . .*

Opp. App. 7a-8a. (emphasis and clarification added).

Petitioner's "change of heart" is unavailing for numerous reasons.

First, the position that the Petitioner *now* takes does not alleviate the constitutional infirmity for numerous businesses and individuals affected by Chapter 6.54. Petitioner changes direction on this long-held position in an effort to emphasize to this Court the provisions of Ord. §§.040(E)(3) (Pet. App. 148a) and .070(D)(3) (Pet. App. 159a), which hold that for what are defined to be "existing" adult businesses and "current" entertainers,[8] any adverse administrative decision that is appealed to any court "shall not take effect until the decision has been upheld by the Court *after adjudication on the merits.*"

Yet, and inexplicably, for "new" businesses and entertainers (those not in operation or performing in the Metropolitan area as of March 1, 1999 (Ord. §.010(L) and (M) (Pet. App. 132a)), there is no such "protection." Rather, for them, an adverse administrative decision "shall take effect the day the decision is issued by the Board." Ord. §§.040(E)(4) (Pet. App. 148a), and .070(D)(4) (Pet. App. 159a).

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[8] These "existing" businesses and "current" entertainers are those that were operating/performing in the Metropolitan area as of March 1, 1999. Ord. §.010(D) and (G) (Pet. App. 131a).

Respondents challenged the constitutionality of Chapter 6.54 not only as applied, but facially as well (*see*, Complaint excerpts, Opp. App. 2a-6a, and *Deja Vu of Nashville*, 274 F.3d at 398-99).[9] Consequently, particularly in light of the fact that literally hundreds of entertainers have come and gone from the Respondents' businesses since March 1, 1999, the concentration by the Petitioner upon this purported "saving language" rings hollow in that it is simply *not applicable* to the circumstance of those entertainers who commenced performing in the Metropolitan area after March 1, 1999, let alone to the new adult entertainment establishments which have opened up for business after that date.

Second, the new "position" of the Petitioner makes little logical or practical sense. Petitioner now contends that the "ordinance provides that the administrative ruling is void unless considered by the court on appeal and sustained." Petition, p. 4. *See also*, Petition, p. 7 (" . . . if the trial court did not grant the writ of certiorari and decide the appeal 'on the merits,' respondents would *automatically prevail*") (emphasis in original).[10] Yet, under

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[9] Given this facial challenge, Respondents certainly had standing to raise the constitutional concerns of these "new" entertainers. *See, e.g., Connection Distributing Co. v. Reno*, 154 F.3d 281, 295 (6th Cir. 1998) (magazine had ability to assert rights of readers); and *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1252-53 (5th Cir. 1995) (exotic dance club had standing to assert constitutional claims of entertainers who performed at the establishment).

[10] Again, these arguments of the Petitioner truly apply, if at all, only in the circumstance of *existing* businesses and *current* entertainers. As spurious as they may be, these assertions have absolutely no application to *new* businesses or entertainers.

the Petitioner's "logic," an aggrieved applicant or license holder could prevail in regard to any adverse administrative ruling by the Board simply by filing a petition for a common law writ, making no arguments of merit, and then "winning" their case when the court denies the petition!

Third, and illustrative of the questionable logic of the Petitioner's "new and improved" approach, the fact remains that for four plus years, Metro has taken the unwaivering position with the District Court and with the Circuit Court of Appeals that under Tennessee law, a denial of a petition for a writ of certiorari *was* a "decision on the merits." In addition, certainly in regard to *"new"* entertainers and businesses, a denial of a petition for a common law writ means that an aggrieved applicant or license holder will have received *absolutely no judicial review at all to an adverse administrative ruling by the Board.*[11]

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[11] Petitioner asserts that "there is no dispute that the writ would be denied, if ever, only in the most extraordinary circumstances." Petition, p. 10 n.8. That is far from an accurate characterization of the law in Tennessee and the proceedings below. First, the Affidavit of Claudia Bonnyman submitted by the Petitioner in the District Court (Opp. App. 9a-10a) falls far short of asserting that *all* petitions for a common law writ of certiorari are granted. *See, Deja Vu of Nashville*, 274 F.3d at 402. Second, the non-constitutional and non-procedural factual matters that would be at issue in many of the requests for judicial review could only be rectified by seeking redress in regard to the *intrinsic correctness* of the administrative ruling, which is *not* an appropriate function of the common law writ. Accordingly, most of those petitioners would be denied as a matter of due course. And, there is no shortage of Tennessee cases illustrating courts denying writs based upon just that fact.

Fourth, while the Petitioner attempts to dismiss this significant change of position as merely agreeing with a "construction of state law," Petition, p. 6 n.6, that is not the case. Not only did the District and Circuit Courts not "construe" the ordinance in the fashion as suggested by the Petitioner, but, more to the point, those federal courts are not even empowered to provide such a limiting construction of state law. *Virginia v. American Booksellers Assn.*, 484 U.S. 383, 397 (1988) ("we will not rewrite a state law to conform it to constitutional requirements"); and *Freedman*, 380 U.S. at 369 (federal courts lack jurisdiction to authoritatively construe state legislation).

## IV. CERTIORARI SHOULD BE DENIED BECAUSE THE SIXTH CIRCUIT RULED CORRECTLY IN THIS ACTION.

Irrespective of any perceived "split" in the circuits, and irrespective of the other constitutional infirmities of Chapter 6.54 as referenced, *supra*, Petitioner simply fails to present any persuasive argument that the Sixth Circuit

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*See, e.g., Fite v. State Board of Paroles*, 925 S.W.2d 543 (Tenn. App. 1996) (*appeal denied* May 28, 1996) ("petition does not state any facts that would support a claim that the Board acted illegally, fraudulently, or arbitrarily, or that it exceeded its authority," and therefore petitioner "is not entitled to a Writ of Certiorari"). Third, the Petitioner itself clearly acknowledges that the courts have the authority and discretion to deny a petition for a common law writ. *See, e.g.*, Petition, p. 4. Finally, the Petitioner actually has it backwards, in that a common law writ of certiorari is to be *granted* only under "unusual or extraordinary circumstances." *Clark*, 827 S.W.2d at 316-17.

was incorrect in its ruling that *Freedman* requires a prompt judicial determination. This Court has never held that mere judicial access affords appropriate First Amendment protections, and since the time of the decision in *Freedman*, the rulings of this Court have repeatedly used language affirming that a prompt final judicial resolution is required.

In *Freedman* itself, in defining "prompt judicial review," this Court used the phrases "final judicial determination on the merits," and "judicial resolution." *Freedman*, 380 U.S. at 59. In *Blount v. Rizzi*, 400 U.S. 410, 417 (1971), reference is made to a requirement for a "final judicial determination on the merits within a specified, brief period." Similarly, in *Southeastern Promotion, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975), which coincidentally also dealt with the writ system in the State of Tennessee, this Court found the existing state procedures lacking and once again articulated that *Freedman* required a "prompt final judicial determination." *See, also, Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 161 n.3 (1969) (Harlan, J., concurring) ("although Shuttlesworth could have petitioned for a writ of mandamus in the Alabama Circuit Court if the City Commission denied his application, that state court is not obligated to render a decision within any fixed period of time"); and *FW/PBS*, 493 U.S. at 228 (the plurality of the Court noting that in a licensing scheme involving "adult" businesses, "*the first two [Freedman] safeguards are essential*") (emphasis and clarification added).

## V. THE CONFLICT AMONGST THE CIRCUITS IDENTIFIED BY PETITIONER IS NOT AS FRACTIOUS AS PETITIONER ASSERTS.

Petitioner argues that this Court should grant the petition because the circuits are in conflict on the question of whether this Court's decisions in *Freedman* and *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990), require merely prompt judicial access or a prompt judicial decision. Petition, p. 8. Yet, upon closer examination, this conflict is not as apparent and troublesome as it may appear at first blush.

To date, three circuits have explicitly held that in the context of adult business licensing schemes, a prompt judicial determination on the merits is required to satisfy the *Freedman* prompt judicial review requirement. *See, Nightclubs, Inc. v. Paducah*, 202 F.3d 884, 892-93 (6th Cir. 2000); *Baby Tam & Co. v. Las Vegas*, 154 F.3d 1097, 1101 (9th Cir. 1998); and *11126 Baltimore Blvd., Inc. v. Prince George's Cty.*, 58 F.3d 988, 998-1001 (4th Cir. 1995) (*en banc*). While the First and Seventh Circuits are claimed to be in conflict with these decisions (Petition, p. 9), that is not the case. In both *Jews for Jesus, Inc. v. Massachusetts Bay Transportation Authority*, 984 F.2d 1319 (1st Cir. 1993), and *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993), the appellate courts evaluated time, place, and manner restrictions on public fora closely akin to the regulation at issue in *Thomas v. Chicago Park District*, 122 S.Ct. 775 (2002). In *Thomas*, this Court determined that time, place, and manner restrictions of public fora need not comply with the *Freedman* procedural safeguards ordinarily required of prior restraints targeting sexually oriented expression. To the extent that the First and Seventh Circuits reached similar

conclusions, they are not in conflict with the majority construction of the prompt judicial review requirement. As such, this Court should not accept certiorari in this case because the alleged conflict amongst the circuits is not as pronounced as the Petitioner suggests.

## CONCLUSION

Because the Sixth Circuit ruled correctly in this case, and because resolution of the prompt judicial determination/access question is not necessary to uphold the decision of the Sixth Circuit, Respondents respectfully request that the petition be denied.

Respectfully submitted,

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## APPENDIX

Tennessee Code Annotated

***27-8-101. Constitutional basis.*** – The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy. [Code 1858, § 3123 (deriv. Const. 1834, art. 6, § 10); Shan., § 4853; Code 1932, § 8989; T.C.A. (orig. ed.), § 27-801.]

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***27-8-102. Cases in which writ lies.*** – Certiorari lies:

(1) On suggestion if diminution;

(2) Where no appeal is given;

(3) As a substitute for appeal;

(4) Instead of audita querela; or

(5) Instead of writ of error. [Code 1858, § 3124; Shan., § 4854; Code 1932, § 8990; T.C.A. (orig. ed.), § 27-802.]

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[Page 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. a Tennessee corporation; MICHAEL RUCKER, individually; MICHAEL BUTLER, individually; MERONEY ENTERTAINMENT, INC., d/b/a KEN'S GOLD CLUB, a Tennesse corporation, THE PLEASURE PALACE, INC., a Tennessee corporation; CAROUSEL AMUSEMENT CENTER, INC., a Tennessee corporation; DAWN PIERCE and ELIZEBETH MARTZ, individually,

Plaintiffs,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; EMMITT TURNER, Chief of Police of the Metro Police Department,

Defendants.

CIVIL ACTION NO. 3-97-1066

JUDGE NIXON

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VERIFIED COMPLAINT FOR PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, AND DECLARATORY JUDGMENT

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1. This is a civil action whereby Plaintiffs pray for a preliminary and permanent injunction enjoining the

Defendants from enforcement of Chapter 6.54 of the Code of Ordinances of the Metropolitan Government of Nashville and Davidson County, Tennessee (hereinafter "Chapter 6.54" or the "Ordinance"), passed on third

[Page 2]

reading by its Metropolitan County Council on August 19, 1997, on the ground that this Ordinance is unconstitutional on its face and as applied, and in its threatened application to Plaintiffs in their activities described below. Further, Plaintiffs pray for a declaratory judgment to determine the constitutionality of said Ordinance on its face, as applied to Plaintiffs, and in its threatened application to them, and Plaintiffs also request attorney fees as a result of the injuries sustained to their fundamental constitutional rights.

* * *

[Page 9]

* * *

20. Chapter 6.54 is an extremely lengthy and complex licensing and permitting scheme containing numerous and various restrictions, regulations and prohibitions affecting the constitutionally protected conduct of the Plaintiffs, their agents, representatives and employees as well as those individuals from the consenting adult audience which seek to view the entertainment or to purchase, rent and/or view other expressive media provided by the Plaintiffs. Because of the length and complexity of the Ordinance, the Plaintiffs, for the sake of clarity, will state the general grounds upon which they rely that the Ordinance is unconstitutional and will then

specifically list the provisions which violate one or more of the Plaintiffs' constitutional rights.

21. Plaintiffs aver that the licensing scheme as a whole is unconstitutional on its face, or as applied, because of the lack of procedural safeguards. It violates due process and is overbroad.

[Page 10]

It further violates equal protection. In addition, individual provisions of the Ordinance are unconstitutional or unconstitutional as applied to the Plaintiffs.

* * *

[Page 15]

* * *

22. Plaintiffs aver that the following licensing provisions in the Ordinance are in violation of one or more of the constitutional rights of Plaintiffs as listed in the preceding paragraphs. Plaintiffs aver that these are examples of the unconstitutionality of the Ordinance in violation of said constitutional provisions and do not constitute all of the provisions which will be demonstrated as unconstitutional on their face, or as applied.

* * *

[Page 21]

* * *

(P) The provision for a permit is denial of the right to travel of any featured dancers from out of state who could not be engaged to entertain because of the lengthy permit procedure.

* * *

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* * *

WHEREFORE, PLAINTIFFS PRAY that the Court grant its relief as follows:

(A) A preliminary injunction enjoining the Defendants, their agents, servants and employees from enforcing the Ordinance as alleged herein.

(B) A declaration that the Ordinance is unconstitutional and violative of First, Fourth, Fifth and Fourteenth Amendment rights guaranteed to Plaintiffs by the United States Constitution and Article 1, Section 19, Article 1, Section 8, and Article 11, Section 8 of the Tennessee Constitution.

(C) A permanent injunction, permanently enjoining and restraining the Defendants, their agents, servants and employees from enforcing the Ordinance.

(D) For attorneys fees and costs of this action, pursuant to 42 U.S.C. 1988.

(E) For all such other, further and different relief, both general and special, as to which the Plaintiffs may be entitled in the premises and as justice and equity may require.

[Page 27]

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* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

| | | |
|---|---|---|
| DEJA VU OF NASHVILLE, INC., et al., | ) | |
| Plaintiffs, | ) | |
| vs. | ) | Case No.: 3-97-1066 |
| METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al., | ) | |
| Defendants. | ) | |

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TRANSCRIPT OF PROCEEDINGS
November 5, 1998

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BEFORE THE HONORABLE SENIOR JUDGE
JOHN T. NIXON,
DISTRICT JUDGE

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[Page 19]

* * *

MR. CHARLES: Your Honor, my name is Jim Charles. I will just have a short response to that.

Let me go back to the Court's first question, what would happen if the writ of cert was denied. Case law is clear in Tennessee, a denial of a writ of cert is a decision on the merits; you then appeal to the Court of Appeals. You would have the right –

THE COURT: What happens to the stay?

MR. CHARLES: The stay would be lifted, Your Honor.

THE COURT: All right.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

| | |
|---|---|
| DEJA VU OF NASHVILLE, INC., a Tennessee Corporation, *et al.*, Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY TENNESSEE, and EMMETT TURNER, Chief of Police, in his official capacity Defendants. | Case No. 3:97-1066 Judge Nixon Magistrate Griffin Consolidated cases |
| and JERRY C. PENDERGRASS, et al., Plaintiffs, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, Defendant | Case No. 3:97-1176 |

AFFIDAVIT OF CLAUDIA BONNYMAN

The affiant, Claudia Bonnyman, having been duly sworn, makes oath as follows:

1. I am the Clerk and Master for the Chancery Courts of Davidson County.

2. I have been the Clerk and Master for nine (9) years.

3. Generally, when a petition for a writ of *certiorari* is filed, the petition, a proposed brief order ("fiat") and proposed writ of *certiorari* are placed before a Chancellor the same day

[Page 2]

the petition is filed. The short order ("fiat") directs the Clerk and Master to issue the writ of certiorari in the case.

4. When the signed order is returned to my office by the chancellor, the writ of *certiorari* is signed by the Clerk (or a deputy clerk) and it is issued usually within one hour of receipt of the court order.

5. Generally, our office processes all petitions for a writ of *certiorari* including presenting the proposed order and petition to a chancellor, docketing the signed order and issuing the writ of *certiorari* within two days of the filing of the petition.

6. I am over the age of 18 years and I am competent to testify as to the matters contained herein.

And further Affiant sayeth not.

/s/
Claudia Bonnyman

State of Tennessee )
County of Davidson )

Sworn to and subscribed before me this 4th day of November, 1998.

/s/ [Vicki J. Bailey]
NOTARY PUBLIC

My Commission Expires:
*My Commission Expires JAN. 27, 2001*

AGENDA

April 27, 1999

9:00 a.m.

METROPOLITAN ADULT ENTERTAINMENT BOARD
700 SECOND AVENUE SOUTH
HOWARD OFFICE BUILDING NASHVILLE

---

ELITE REPORTING SERVICES
ANGELA M. SYES, CCR
806 Porter Road
Nashville, Tennessee 37206
(615) 262-9592

* * *



* * *

Applications for adult entertainment licenses. Deja Vu of Nashville, 1214 Demonbreun Street.



MS. BORUM: Our recommendation is that it does not comply with health inspections. Some of the items on that health inspection report is: To clean the couches, rest room walls, fixtures, shower stall; repair commode; provide covered waste containers. Charles, in his inspection, noted a violation of the 3-foot rule.

MR. CHAIRMAN: All right.

MS. SCHAFFNER: I take it the fourth sheet back in the packet is the health inspection report?

MS. BORUM: That is correct.

MS. SCHAFFNER: And that inspection indicates that the couches need to be cleaned. Sanitation of the floors and the cubicles need to be improved. Covered waste containers need to be provided throughout the establishment. The commode in the dressing room needs to be repaired. The rest room walls and fixtures need to be cleaned. And the shower stall in the dressing room needs to be cleaned; is that right?

MS. BORUM: Yes, ma'am, that is correct.

MS. SCHAFFNER: Then . . .

MR. CHAIRMAN: Okay. So that it . . .

MS. SCHAFFNER: Then the inspector's report is the last sheet; is that right?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: And the inspector's



finding upon inspection was that the dancers were in violation of the 3-foot rule; is that correct?

MS. BORUM: That is correct.

MS. SCHAFFNER: On the codes or building there was no findings since there were no booths; is that right?

MS. BORUM: Yes, ma'am, that is correct.

MS. SCHAFFNER: And as far as the police report, it was approved?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: And the zoning was approved?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: I move that we deny this application on the basis of the health inspection and the – this board's inspector's report.

MR. CHAIRMAN: It has been moved that we deny this report based on the – deny this application based on the inspector's report and this report from health.

Is there a second?

MS. STEVENS: Second.

MR. CHAIRMAN: Any discussions? All in favor signify by aye.

(All board members voted aye.)

* * *

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The next application is Pleasure Palace, 2407 Dickerson Pike.

Ms. Borum.

MS. BORUM: Our recommendation is that it does not comply with health codes. Some of these items were: Repair hand sink; clean walls and all air conditioning vents; clean storage areas; provide hand towels.

On your checklist sheet from Charles and myself, we received a late report yesterday afternoon from the building inspector who went out and made another inspection and approved the booth requirements.

MS. STEVENS: What does nonconforming mean?

MS. BORUM: Legally, "nonconforming" means that it was there prior to the funding. It's grandfathered in.

MS. SCHAFFNER: I take it that the building inspector's report disapproval since it . . .

MS. BORUM: It is marked disapproved on the checklist. I was handed the report about 5 until 4 yesterday afternoon.

MS. SCHAFFNER: Which disapproves or



approves?

MS. BORUM: That approves, as far as the building inspector.

MS. SCHAFFNER: So the only thing that's disapproved, then, is the health . . .

MS. BORUM: That is correct.

MS. SCHAFFNER: . . . report, which includes a need for repairing hand sink for the ease of cleaning; thoroughly cleaning the walls in booths and air conditioning vents in the hall; providing a minimum of 10-foot candles of illumination at the floor level in booths; cleaning up storage areas; eliminate all unnecessary items on

lower level; and provide hand towels in the bathrooms; is that correct?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: I move that this application be denied on the basis of the health report.

MR. CHAIRMAN: It has been moved that this application be denied on the basis of the health report. Is there a second?

MS. STEVENS: Second.

MR. CHAIRMAN: Any discussion?

MR. BANKS: One question, Mr. Chairman. How will – how do they determine what the candle – how do they determine that?



MS. SCHAFFNER: I think it's a lighting machine, you know, that . . .

MR. BANKS: That they carry with them that determines the lighting?

MS. BORUM: It's measured from the feet.

MR. BANKS: That's all I have.

MR. CHAIRMAN: Okay. All in favor signify by aye.

(All board members voted aye)

MR. CHAIRMAN: Any nays?

Motion carries. This application is denied.

* * *

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MR. CHAIRMAN: The next is Club Platinum, 1711 Hayes Street.

MS. BORUM: We recommend disapproval. It does not comply with health code. Some of those items: Repair toilet; clean showers; eliminate storage that may attract rodents and insects.

MR. CHAIRMAN: Everything else is approved?

MS. BORUM: Yes, sir, everything else is approved.

MS. SCHAFFNER: So that includes repairing the toilet in the men's rest room, cleaning the floors along the lockers in the dressing room?

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MS. BORUM: That is correct.

MS. SCHAFFNER: Cleaning the showers in the dressing room, eliminating storage that may attract rodents and insects and cause – something.

MS. BORUM: Harborage.

MS. SCHAFFNER: What is harborage?

MR. CHARLES WATKINS: Places for rodents or insects to hide.

MS. SCHAFFNER: All right. I move this application be denied based upon the health inspection report.

MR. CHAIRMAN: Do we have a second?

MS. STEVENS: Second.

MR. CHAIRMAN: It has been moved and properly seconded that this application be denied based on the health inspector's report. All in favor say aye.

(All board members voted aye.)

MR. CHAIRMAN: Any nays? Application is denied.

* * *

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* * *

The next application is the Executive Club,

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701 4th Avenue South.

MS. BORUM: We recommend disapproval. It does not comply with health codes. Some of these items: Repair couch, clean rest room floors, provide covered trash cans.

MS. SCHAFFNER: I move this application be denied on the basis of the health violations.

MR. CHAIRMAN: Is there a second?

MR. STEVENS: Second.

MR. CHAIRMAN: It has been moved and properly seconded that this application be denied based on the health violations. All those in favor signify by – is there any discussion from the board? All in favor signify by aye.

(All board members voted aye.)

MR. CHAIRMAN: Any nays? This application is denied.

* * *

TN ST S 57-4-204

T. C. A. § 57-4-204

***WEST'S TENNESSEE CODE ANNOTATED TITLE 57. INTOXICATING LIQUORS CHAPTER 4. CONSUMPTION OF ALCOHOLIC BEVERAGES ON PREMISES PART 2 – ADMINISTRATION, ENFORCEMENT, PROHIBITED ACTS***

Current through End of 2001 First Reg Sess.

§ 57-4-204. Prohibited sexual conduct or representations

(a) In addition to the other duties imposed under this title, the commission is authorized to enforce the provisions of subsections (b), (c), and (d); and upon violation of such subsections by any person, firm or corporation licensed under the provisions of this chapter, the commission shall revoke the privilege license of such violator.

(b) The following acts or conduct on licensed premises are deemed contrary to public policy, and therefore no license shall be held at any premises where such conduct or acts are permitted:

(1) To employ, use or allow any person in the sale or service of alcoholic beverages or malt beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or of any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals;

(2) To employ, use or allow the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such

attire, costume or clothing as described in subdivision (b)(1);

(3) To encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person;

(4) To permit any employee or person to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

(c)(1) Conduct or acts on licensed premises in violation of this subsection are deemed contrary to public policy, and therefore no license shall be held at any premises where such conduct or acts are permitted.

(2) Live entertainment is permitted on any licensed premises, except that:

(A) No licensee shall permit any person to perform acts of or acts which simulate:

(i) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law;

(ii) The touching, caressing or fondling of the breast, buttocks, anus or genitals; or

(iii) The displaying of the pubic hair, anus, vulva or genitals.

(B) Subject to the provisions of subdivision (2)(A), any entertainer who is employed in whole or in part by the licensee to dance at such licensee's premises shall perform only upon a

stage at least eighteen inches (18") above the immediate floor level and removed at least six feet (6') from the nearest patron.

(3) No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

(4) No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his genitals or anus.

(d) The following conduct or acts on licensed premises are deemed contrary to public policy, and therefore no license shall be held at any premises where such conduct or acts are permitted:

(1) The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

(A) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law;

(B) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals;

(C) Scenes wherein a person displays the vulva or the anus or the genitals; or

(D) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

(e) Each county, city, or metropolitan government is empowered upon approval by a two-thirds (2/3) vote of its legislative body to authorize its law enforcement officers to conduct investigations into alleged violations of subsections (a)-(d), and such law enforcement officers shall report such violations to the commission for appropriate action by such commission.

(f) The commission shall be immune from liability resulting from conduct or acts of any law enforcement officers authorized to investigate violations of subsections (a)-(d) as provided in subsection (e).

1980 Pub.Acts, c. 904, §§ 1 to 3.

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Metropolitan Code Section 7.24.030

Prohibited acts or conduct – Enforcement authority.

A. In addition to the other duties imposed by the metropolitan beer permit board by the Metropolitan Code of Laws, it shall be the duty of such board to enforce the provisions of this section and revoke or suspend the beer permit of any person, firm, corporation, syndicate or association, upon notice and hearing, for violation of the provisions of this section.

B. The following acts or conduct have been declared contrary to public policy by the General Assembly of the State of Tennessee when such activities take place upon premises licensed by the alcoholic beverage commission, pursuant to Tennessee Code Annotated Sections 57-4-101, et seq.; and the same are declared to be against the public

policy of the metropolitan government of Nashville and Davidson County, and therefore, no beer permit shall be held at any premises where such contract or acts are permitted:

1. To employ, use or allow any person in the sale or service of beer or like alcoholic beverages in or upon the premises of a permittee while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals;

2. To employ, use or allow the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire, costume or clothing as described in subdivision 1 of this subsection;

3. To encourage or permit any person on the premises of a permittee to touch, caress or fondle the breast, buttocks, anus or genitals of any other person;

4. To permit any employee or person to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

C. Acts or conduct in premises licensed by the alcoholic beverage commission pursuant to Tennessee Code Annotated Sections 57-4-101, et seq. have been deemed contrary to public policy by the General Assembly of the state of Tennessee, and are declared against the public policy of the metropolitan government of Nashville and Davidson County; and, therefore, no beer permit shall be held at any premises where such conduct or acts are

permitted. Live entertainment is permitted on premises of a permittee except that:

1. No permittee shall permit any person to perform acts of or acts which simulate:

a. Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law;

b. The touching, caressing or fondling of the breast, buttocks, anus or genitals;

c. The displaying of the pubic hair, anus, vulva or genitals.

2. Subject to the provisions of subdivision 1 of this subsection, any entertainer who is employed in whole or in part by the permittee to dance at such permittee's premises shall perform only upon a stage at least eighteen inches above the immediate floor level and removed at least six feet from the nearest patron.

3. No permittee shall permit any person to use artificial devises or inanimate objects to depict any of the prohibited activities described above.

4. No permittee shall permit any person to remain in or upon the premises who exposes to public view any portion of his or her genitals or anus.

D. The following acts or conduct have been declared contrary to public policy by the General Assembly of the state of Tennessee when such activities take place upon premises licensed by the alcoholic beverage commission, pursuant to Tennessee Code Annotated Sections 57-4-101, et seq.; and the same are declared to be against the public policy of the metropolitan government

of Nashville and Davidson County; and, therefore, no beer permit shall be held at any premises where such conduct or acts are permitted:

1. The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

a. Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law;

b. Any person being touch [sic], caressed or fondled on the breast, buttocks, anus or genitals;

c. Scenes wherein a person displays the vulva or the anus or the genitals;

d. Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above. (Ord. 90-1339 § 1(5-7), 1990; prior code § 5-1-34)

(Nashville 4-93)

MOTION FILED
APR 1 0 2002

(3)

No. 01-1324

IN THE
# Supreme Court of the United States

The Metropolitan Government of Nashville and Davidson County and Emmett Turner, Chief of Police of the Metropolitan Police Department,
*Petitioners*,

v.

Déjà vu of Nashville, Inc., *et al.*,
*Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

## MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, IN SUPPORT OF PETITIONERS

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18 pp

## MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Pursuant to Sup. Ct. Rule 37.2(b), *amicus* International Municipal Lawyers Association (IMLA) move for leave to file the attached *amicus curiae* brief in support of the Petition for a Writ of Certiorari, seeking review of *Déjà Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County*, 274 F.3d 377 (6th Cir. 2001).

IMLA is a nonprofit, nonpartisan professional organization consisting of more than 1,400 members. It is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. The confusion in the lower courts over the meaning of the "prompt judicial review" requirement for content-neutral licensing regulations has resulted in the unwarranted invalidation of numerous local ordinances for reasons that are beyond cities' control and that are inconsistent with this Court's rulings on time, place, and manner regulations. IMLA, as an organization advocating the interests of local governments, seeks leave to file the attached brief on behalf of its members nationwide.

This motion is necessary because Respondents have declined to consent to the filing of this *amicus curiae* brief.

Respectfully submitted,

SCOTT D. BERGTHOLD
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## INTEREST OF AMICUS*

* Pursuant to Rule 37.6, *amicus curiae* International Municipal Lawyers Association discloses that no counsel for any party in this case authored this brief in whole or in part. No person or entity other than *amicus*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

IMLA is a nonprofit, nonpartisan professional organization consisting of more than 1,400 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities. IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

Since its establishment, IMLA has advocated for the rights and privileges of local governments, and the attorneys who represent them, through its Legal Advocacy Program. Specifically, the Legal Advocacy Program of IMLA serves the membership by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as an amicus curiae on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

IMLA's specific interest in this case lies in the efforts of its member cities and counties to control the adverse secondary effects of sexually oriented businesses through narrowly tailored licensing regulations. IMLA, as an organization advocating legal issues on behalf of local governments, files this brief on behalf of its members nationwide.

## STATEMENT

This case presents an important question of constitutional law warranting this Court's intervention. The confusion in the lower courts since *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), has resulted in the unwarranted invalidation

of numerous local ordinances for reasons that are beyond cities' control and that are inconsistent with this Court's rulings on time, place, and manner regulations.

The common law writ processes operative in many states and, therefore, in a myriad of local ordinances (not only adult business ordinances), have repeatedly fallen subject to the "prompt judicial review" controversy. The widespread use of common law certiorari and mandamus for review of various administrative decisions – any of which could be challenged on constitutional grounds – makes the controversy particularly suited for this Court's resolution. A brief review of reported cases demonstrates the frequency with which this issue has arisen:

- *11126 Baltimore Blvd. v. Prince George's County*, 58 F.3d 988 (4th Cir. 1995) (en banc) (holding that Maryland's common-law writ of certiorari procedure fails prompt decision requirement)
- *MacDonald v. City of Chicago*, 243 F.3d 1021 (7th Cir. 2000) (concluding that the common law writ of certiorari procedure in Illinois satisfies the First Amendment)
- *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884 (6th Cir. 2000) (finding Kentucky common law writ of certiorari insufficient)
- *Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634, 641 (4th Cir. 1999) ("North Carolina's common law writ is a 'simple and expeditious' way to obtain judicial review.")
- *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998) (Nevada writ of mandamus procedure fails prompt judicial decision test)
- *Blue Moon Enterprises, Inc. v. Pinellas County Dep't of Consumer Protection*, 97 F.Supp.2d 1134 (M.D. Fla. 2000) (Florida common law writ of certiorari satisfies prompt judicial review)

- *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir. 1999) (California writ of mandamus procedure insufficient)
- *T Backs Club, Inc. v. Seaton*, 84 F.Supp.2d 1317 (M.D. Ala. 2000) (upholding ordinance lacking explicit judicial review provision, where plaintiffs had numerous common law remedial writs and Alabama statutory processes for challenging ordinance)
- *Nightclub Mgmt., Ltd. v. City of Cannon Falls*, 95 F.Supp.2d 1027 (8th Cir. 2000) (Minnesota writ of certiorari fails prompt judicial decision)
- *Gasparo v. City of New York*, 16 F. Supp. 2d 198 (E.D. N.Y. 1998) (New York's codification of common law writ process, Article 78, likely satisfies prompt judicial review)
- *Pennsylvania Pride, Inc. v. Southampton Twp.*, 78 F.Supp.2d 359 (M.D. Pa. 1999) (Pennsylvania mandamus action fails to provide prompt judicial decision)
- *City of Colorado Springs v. 2354, Inc.*, 896 P.2d 272 (Colo. 1995) (Colorado's administrative review process satisfies First Amendment by providing prompt access to court)

The recurring nature of the prompt judicial review issue justifies the granting of certiorari to provide cities with clarification based on this Court's precedents.

Twenty-six years ago, the Court decided its first case concerning local zoning and licensing controls employed to prevent the "admittedly serious problems" caused by sexually oriented businesses. *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1974). Rejecting the adult theaters' assertion that Detroit's licensing requirement constituted an impermissible prior restraint, a majority of the Court concluded that the city's classification of theaters specializing in erotic fare was justified by the city's desire to

control the adverse impacts of those commercial enterprises. *Id.* at 62-63.

Ten years later, in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court reiterated that such classification was necessary to ensure that the city's regulation was "'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations in *Schad v. Mount Ephraim*, 452 U.S. 61 (1981), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)." *Id.* at 52.

Next, in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), a plurality of this Court applied traditional prior restraint analysis – originally created to deal with content-based censorship, *Freedman v. Maryland*, 380 U.S. 51 (1965) – to a content-neutral time, place, and manner regulation designed to control the secondary effects of sexually oriented businesses. Recognizing that the Dallas ordinance was "significantly different from the censorship scheme examined in *Freedman*" because "the city does not exercise discretion by passing judgment on the content of any protected speech," the plurality split the *Freedman* test and decided that some, but not all, of the *Freedman* standards applied. *Id.* at 229-230. The Court invalidated the ordinance for vesting unbridled discretion, in the form of potential delay, in city officials and for failure to provide "an avenue for prompt judicial review" in the event of a license denial. *Id.* at 229.

To clarify the meaning of "prompt judicial review," the Court granted certiorari in *Thomas v. Chicago Park District*, 122 S. Ct. 775 (2002), but ultimately concluded that the controversy was not presented by the case. In *Thomas*, the Court evaluated another time, place, and manner licensing regulation and unanimously rejected traditional prior restraint analysis on the grounds that censorship was not at issue. *Id.* at 779. "The Park District's ordinance does not authorize a licensor to pass judgment on the content of

speech: None of the grounds for denying a permit has anything to do with what a speaker might say." *Id.*

Although traditional prior restraint analysis did not apply, this Court in *Thomas* reiterated its longstanding requirement "that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review." *Id.* at 780. The Court then ruled that the ordinance provided objective criteria to guide licensing decisions and offered the necessary access to judicial review by writ of common-law certiorari in the Illinois courts. *Id.* at 781.

IMLA contends that this Court's ruling in *Thomas* offers a coherent solution to the split in the circuits and should guide its resolution of this case. Specifically, IMLA urges the Court to grant certiorari and rule that content-neutral time, place, and manner regulations for sexually oriented businesses are constitutional provided that they avoid unfettered discretion (including undue delay), allow prompt *access* to judicial review, and otherwise meet the requirements of the time, place and manner test. *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

## REASONS FOR GRANTING THE WRIT

1. This case squarely presents the question upon which the lower courts have split, namely, whether content-neutral licensing ordinances regulating the time, place, and manner of sexually oriented businesses must provide "prompt access to judicial review" from a license denial, or whether such regulations must also guarantee that the court will decide the merits of the action within a certain number of days.

The Nashville ordinance provides that any adverse licensing decision "may be immediately appealed" by writ of common-law certiorari in the Tennessee courts; indeed, under Chapter 6.54.040(E)(2), an applicant is not even required to exhaust administrative remedies before seeking judicial review. This quick release from the administrative process, coupled with immediate access to an independent

judicial officer, provides an adequate bulwark for First Amendment rights in cases like this, where censorship is not involved and the government interests at stake are "undeniably important." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000).

Whether the bulwark of "prompt access to judicial review" is constitutionally sufficient is squarely presented by the petition, notwithstanding the Sixth Circuit's emphasis on whether Tennessee's common-law writ for certiorari is "discretionary." The plain fact of the matter is that a judge must review a petitioner's constitutional claims in order to decide whether the common-law writ of certiorari should issue. *See, e.g., Arnold v. Tennessee Board of Paroles*, 956 S.W.2d 478 (Tenn. 1997) (reversing dismissal of a petition for common law writ of certiorari where petitioner inmate had stated an Establishment Clause violation).

This judicial review is the functional equivalent of that provided in Illinois by the writ of common-law certiorari deemed sufficient in *Thomas*. 122 S. Ct. at 781; *see Stratton v. Wenona Community Unit School District*, 551 N.E.2d 640 (Ill. 1990) (noting that the issuance of a writ of certiorari is within the discretion of the court). In this case, "no one is suggesting that licensing decisions are not subject to immediate appeal to the courts." *FW/PBS, Inc.*, 493 U.S. at 248 (White, J., concurring in part and dissenting in part). Moreover, the available avenues for challenging Nashville's regulations are not limited by the ordinance. "A person always has a judicial forum when his speech is allegedly infringed ... The 'safeguards' or the absence thereof neither expand nor detract from the courts' jurisdiction over constitutional questions." *Graff v. City of Chicago*, 9 F.3d 1309, 1324 (7th Cir. 1993) (en banc).

Even if the Sixth Circuit's view of Tennessee law – that the trial court may decline to grant certiorari where constitutional issues are raised – is correct, the Nashville ordinance stays licensing decisions adverse to existing businesses pending resolution on the merits by the reviewing court. Thus, a decision by the trial court to not grant

certiorari results in a perpetual stay of the adverse administrative decision, and the business prevails. Pet. App. 33a n.8; see also *id.* 40a (Wellford, J., dissenting). In such a circumstance, an adult business's only complaint is that its appeal was not promptly decided by a court; this grievance is the essence of the circuit conflict and warrants the granting of the Petition.

2. The question presented is an important one to IMLA's membership, because the "prompt judicial determination" requirement is legally unworkable, substantially restricts cities' rights to control secondary effects, and has created an ongoing affront to federal-state relations.

First, it is beyond cavil that cities are powerless to require judicial decisions from courts within a specified number of days. As the Sixth Circuit has previously noted, "Quite obviously, a municipality has no authority to control the period of time in which a state court will adjudicate a matter." *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 893 (6th Cir. 2000). Nevertheless, this unworkable requirement has led to invalidation of municipal ordinances based upon illogical rationales. For example, the federal court in *Mai Lee Le v. City of Citrus Heights*, 1999 U.S. Dist. LEXIS 13477 (E.D. Cal. 1999), following the prompt determination requirement announced in the Ninth Circuit, stated:

> This court has no doubt that a state or federal trial judge, if presented with an application for temporary restraining order, or a motion for preliminary injunction, would exercise his or her duty to "dispose promptly" of the application or motion. Code of Judicial Conduct, Canon 3. However, Freedman and Baby Tam & Co. plainly demand that the Ordinance provide greater assurance than that.

*Id.* at *23.

The unworkable nature of the prompt determination requirement was not lost on the court:

> In demanding this greater assurance, Freedman and Baby Tam & Co. may impose an impossible

> burden on the City. The City lacks the authority to prescribe a specified time when a state or federal judicial officer must render a decision. It has been suggested that the California Legislature could do so – at least with respect to state judicial officers – but even the state's authority is doubtful.

*Id.*

In *Mai Lee Le*, the Legislative Counsel of California had opined that a state law requiring a decision within 90 days of a petition for writ of mandamus seeking judicial review of a license denial would likely violate the separation of powers doctrine. But the impossibility of the requirement did not dispose of its potency:

> In sum, Freedman and Baby & Tam Co. insist on a procedural safeguard that neither the City nor the State of California may have the power to provide. Nonetheless, those decisions – however impractical they may be – are the law. Accordingly, this court has no alternative but to conclude that plaintiffs have shown a probability of succeeding on the merits of their claim that the Ordinance fails to provide for a prompt judicial determination of the merits of a decision to deny an Adult-Oriented Business or Employee License.

*Id.* at 24.

As this Court clarified in *Thomas*, the First Amendment does not require such absurd results. Under *FW/PBS*, a city is not required to initiate litigation to defend its denial of a license. 493 U.S. at 230. Neither should a city be required to specify a deadline for judicial determination of an appeal of a license denial. Such a deadline is logical only where – as the Court has ruled in censorship cases – the government is required to initiate the court action and the private party remains passive. In such cases, the deadline forces the government to quickly pursue resolution of the case. However, where the adult business initiates litigation (as *FW/PBS* envisioned), the business can request – and has the incentive to request – emergency relief or expedited

proceedings. On the other hand, circuits requiring cities to guarantee prompt judicial decisions have reversed the contemplated incentives and have required cities to bear the entirety of the judicial review burden.

Second, the "prompt judicial determination" rubric has led to a gross diminution – far beyond that contemplated by *FW/PBS, Inc.* – in the ability of local governments to control sexually oriented enterprises and their corresponding secondary effects.

The practical effect of requiring a judicial deadline is to require cities to issue permits whenever courts fail to decide adult business cases on time. *See Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 894 (6th Cir. 2000) ("For example, an ordinance could provide that a license shall issue if a reviewing court fails to reach a decision within a reasonably brief period of time.") Thus, cities are compelled to issue permits to applicants despite the fact that they are not eligible for such permits under content-neutral, narrowly tailored regulations. For example, under Nashville's ordinance – which incorporated the *Paducah* solution to no avail – licenses would have to issue to persons recently convicted of crimes including rape, prostitution, promoting prostitution, and sexual exploitation of a minor. Pet. App. 140a. Similarly, applicants in violation of the locational requirements of the zoning code, or whose premises are in violating of local health regulations, would also have to be licensed. Pet. App. 142a.

IMLA's concern over this anomaly is heightened due to recent expansion of the "prompt judicial determination" doctrine to encompass license renewals, suspensions, and revocations which, by definition, are restraints imposed *subsequent* to, not prior to, expressive activity.

In *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001), this court reiterated the fundamental distinction between prior restraints and post-permit enforcement of content-neutral regulations:

> Full briefing and argument have revealed that the question City News tendered, and which we took up

> for review, is not now and never was accurately reflective of City News's grievance. Unlike the initial license applicant whose expression cannot begin prepermission (the situation of the complainant in *Freedman*), City News was already licensed to conduct an adult business and sought to fend off a stop order.

*Id.* at 285.

This distinction has been thoroughly developed in this Court's precedents. *See, e.g., Alexander v. United States*, 509 U.S. 544 (1993); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). Nevertheless, lower courts have expanded the prompt decision rule in sexually oriented business cases to the detriment of cities. In *City of Paducah, supra*, for example, the judicial deadline requirement caused the Sixth Circuit to conflate the first two prongs of *Freedman*:

> We recognize that, as a practical matter, the requirement of prompt judicial review means that a city seeking to impose a licensing scheme must take certain steps to avoid constitutional infirmities. Specifically, a city may very well have to go beyond merely maintaining the status quo and actually permit the communication of protected expression until a judicial decision is rendered on a matter.

202 F.3d at 894; *compare East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 225 (6th Cir. 1995) ("The status quo for a business seeking a permit to begin operating a sexually oriented business, however, is non-operation. The city, therefore, does not need to allow operation pending review.")

Similarly, in *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir. 1999), the Ninth Circuit concluded that the prompt judicial determination requirement applies not only to license denials, but also to license suspensions and revocations – *subsequent* restraints enforced against businesses violating content-neutral regulations. Guided by "the policy consideration underlying this safeguard," the court concluded that it "must determine how to best further

that policy in applying the judicial review safeguard to a license suspension or revocation." *Id.* at 1115. Following the *prior* restraint rationale of *Freedman*, the court stated: "In pursuing this goal, we conclude that we must extend *Baby Tam*'s requirement of an opportunity for a prompt hearing and decision by a judicial officer in license denial cases to license suspensions or revocations as well." *Id.*

Perhaps the most egregious misapplication of the prompt judicial determination doctrine is in the case at bar, where there is no restraint at all because adverse administrative decisions are stayed pending judicial review. The Nashville ordinance provides that if respondents appeal, an adverse administrative decision "shall not take effect until that decision has been upheld by the court after adjudication *on the merits*." See Ord. §§ .040(E)(3) (emphasis added), and .070(D)(3). Nevertheless, the Sixth Circuit deemed this extraordinary safeguard insufficient under *Freedman*. Pet. App. 33a n. 8.

Finally, the underlying current in many of the cases requiring "prompt judicial decision" – including the Sixth Circuit's opinion below – is that state courts are less than competent to act swiftly when constitutional rights are threatened. Indeed, the Sixth Circuit in *City of Paducah* had previously stated that "we cannot be sure that a state judge, *who often is elected* and toiling under a busy docket, will conduct a hearing and render a decision in a prompt manner." 202 F.3d 884, 892 (6th Cir. 2000) (emphasis added) (rejecting district court's assumption that state court would speedily issue injunctive relief if risks to constitutional rights made it necessary).

Such presuppositions, expressed in the "prompt judicial decision" requirement, are inherently likely to cause unnecessary friction in federal-state relations. This is because the rule entails "an unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts to guard, enforce, and protect every right granted or secured by the Constitution of the

United States." *Steffel v. Thompson*, 415 U.S. 452, 460-62 (1974).

Each of these concerns stemming from the prompt judicial review quandary represents an impediment to IMLA's members as they attempt to protect the quality of life in their communities. The confusion in the circuits, the diminished ability of cities to control secondary effects, and the expanded application of inapposite precedents to strike local ordinances all weigh heavily in favor of granting certiorari.

## CONCLUSION

For the foregoing reasons, your *amicus* urges the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 01-1324

IN THE

# Supreme Court of the United States

The Metropolitan Government of Nashville and Davidson County and Emmett Turner, Chief of Police of the Metropolitan Police Department,
*Petitioners*,

v.

Deja Vu of Nashville, Inc., *et al.*,
*Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

## PETITIONERS' REPLY BRIEF

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## PETITIONERS' REPLY BRIEF

This case presents an ideal vehicle to resolve an important and frequently recurring circuit conflict that this Court has already twice granted certiorari to decide: whether the First Amendment guarantees adult businesses a "prompt judicial decision" on appeal from adverse licensing decisions, or instead is satisfied when municipalities provide "prompt access" to judicial review. The ordinance at issue in this case (Ch. 6.54, Metropolitan Code of Nashville and Davidson County ("the Ordinance")) grants adult businesses and entertainers an immediate right of appeal, but it does not mandate a timetable on which a court must grant a writ of certiorari and thus hear the case. The Sixth Circuit, applying that court's settled precedent, which conflicts with decisions of several other circuits, held the Ordinance unconstitutional because it fails to "'assure a prompt judicial decision.'" Pet. App. 33a n.8 (quoting *Freedman* v. *Maryland*, 380 U.S. 51 (1965)) (emphasis omitted). Respondents' contention that this case is an inappropriate vehicle to resolve the conflict because the Ordinance permits judicial review through "common law certiorari" has the matter precisely backwards. Indistinguishable state law certiorari procedures were presented not only in the principal decisions giving rise to the circuit split, but also in *both* of the cases that this Court previously decided to review. The Petition for a Writ of Certiorari accordingly should be granted.

1. Respondents do not dispute that the circuits are in irreconcilable conflict over the principal question presented by the Petition. As this Court has explained, the Sixth Circuit is on the bottom of a four-to-three split. See *Thomas* v. *Chicago Park Dist.*, 122 S. Ct. 775, 781 (2002) (citing cases). Respondents contend in passing (at 17) that this Court miscalculated the conflict in *Thomas* by citing decisions of the First and Seventh Circuits that did not involve "adult business licensing schemes." But this Court correctly recognized that the rationale of the First and Seventh Circuits' rulings places them in square conflict with courts, including the Sixth Circuit, that require a "prompt judicial decision" in the adult-business context. See also, *e.g.*,

*MacDonald* v. *Chicago*, 243 F.3d 1021, 1031 (CA7 2001) (citing Seventh Circuit precedent to expressly reject, *inter alia*, the Sixth Circuit's leading adult-business licensing case, *Nightclubs, Inc.* v. *City of Paducah*, 202 F.3d 884 (CA6 2000)), *cert. denied*, 122 S. Ct. 919 (2002). Even on respondents' view that the circuits are split three-to-two, the conflict is easily substantial enough to justify review in this Court, as is plain from the orders granting certiorari in both *Thomas*, *supra*, and *City News & Novelty* v. *Waukesha, WI*, 531 U.S. 278 (2001).[1]

2. Every judge to consider respondents' challenge to the Ordinance has concluded that, because administrative rulings for "existing" entertainers and businesses are stayed pending a decision by the court "on the merits" of any appeal (Ord. § .040(E)(3), .070(D)(3)), those administrative rulings do not take effect unless and until the court grants the writ of certiorari and decides the appeal. See Pet. App. 33a n.8, 40a, 99a. The lower courts' construction of Tennessee law is binding absent exceptional circumstances not present here. See *Runyon* v. *McCrary*, 427 U.S. 160, 181-82 (1976). It thus makes no difference that (as respondents belabor (at 11-15) and the Petition acknowledged (at 5-6 n.6)) petitioner contended at oral argument before the district court that the denial of a writ of certiorari was a decision "on the merits."

---

[1] Nor do respondents even attempt to dispute the great importance of the question presented. An array of municipalities nationwide now face challenges to their content neutral adult-business licensing schemes because they are powerless to guarantee that the state courts will decide appeals from administrative rulings by a date certain. See generally IMLA *Amicus* Br. Both petitioner and the State of Tennessee have been required to amend their municipal and state laws to conform to an ever-expanding mandate under the Sixth Circuit's construction of the First Amendment. See, *e.g.*, BIO 5 n.3 (noting state law amendment enacted in response to district court's preliminary injunction); Reply App. 1-2 (reproducing newest statutory amendment adopted by Tennessee legislature to conform state law to Sixth Circuit's decision in this case, which amendment is expressly conditioned on outcome of this case in this Court to avoid any prospect of mootness).

To be sure, respondents correctly note (at 13 & n.9) that their suit is not limited to existing businesses and entertainers. Rather, they brought a facial overbreadth challenge to the entire Ordinance, including the provisions applicable to "new" businesses and entertainers. Under those provisions, the administrative ruling is effective immediately. See Ord. §§ .040(E)(2) & (4), .070(D)(2) & (4). Respondents err, however, in contending that this case is an inappropriate vehicle to decide the question presented with respect to "new" applicants.

Respondents' argument (at 4) is that the Sixth Circuit concluded that the common law writ of certiorari in Tennessee, as in other states, gives a court the power "to deny a petition for issuance of the writ, and never then reach the merits of the issues sought to be reviewed." That much is true. But respondents err in baldly asserting (at 5) that the consequence of the trial court's discretion is that the Ordinance "does not even provide prompt *access* to a judicial forum" (emphasis in original). The Ordinance guarantees that petitioner will issue its administrative decision promptly on a fixed time-table. See Pet. 3 (citing Pet. App. 99a-100a).[2] As noted, the applicant may then immediately file in court its request for certiorari, which sets out all of its claims. This process guarantees "prompt access" to a judicial officer just as much as a provision immediately permitting the adult business to file a "notice of appeal." For this reason, the courts adopting the majority view that "prompt access" to judicial review satisfies the First Amendment sustain measures that, like the Ordinance in this case, do not guarantee when the court will consider the adult business's appeal. See *Baby Tam & Co.* v. *City of Las Vegas*, 154 F.3d 1097, 1101 (CA9 1998) ("The Fifth and Seventh Circuits have held that prompt access to judicial review is sufficient, even if there is no time frame for *a hearing* or a decision on the merits." (emphasis added) (citing

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[2] Thus, although the majority below noted that the First Amendment requires a municipality to make its administrative ruling "within a specified, brief period" (Pet. App. 33a n.8), there is no dispute that the Ordinance satisfies that requirement.

*TK's Video, Inc.* v. *Denton County, Tex.*, 24 F.3d 705, 709 (CA5 1994); *Graff* v. *City of Chicago*, 9 F.3d 1309, 1324-25 (CA7 1993) (en banc), *cert. denied*, 511 U.S. 1085 (1995))).

Furthermore, respondents' emphasis that the Ordinance permits businesses and entertainers to appeal through common law certiorari procedures only highlights that this is an ideal vehicle to resolve the circuit split. The circuits that reject the Sixth Circuit's "prompt judicial decision" requirement hold that indistinguishable discretionary common law certiorari procedures satisfy the First Amendment. Indeed, those decisions lie at the heart of the circuit conflict presented by this case. As the Eleventh Circuit has explained:

> Some courts have considered the holding in [*Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975)] to be a requirement that the statute, regulation or ordinance explicitly provide for prompt judicial review of the decision to suppress expressive activity. Yet, other courts have since distinguished *Southeastern* on its facts to hold that non-statutory judicial access, *usually access through a state's common law writ of certiorari*, is sufficient.
>
> Much of the confusion flows from the Supreme Court's plurality opinion in *FW/PBS*.

*Cannabis Action Network* v. *Gainesville*, 231 F.3d 761, 774 nn.18 & 19 (CA11 2000) (citing *Redner* v. *Dean*, 29 F.3d 1495 (CA11 1994) (adult-business case)), *vacated and remanded*, 122 S. Ct. 914 (2002). The Seventh Circuit has similarly explained:

> In Illinois, judicial review of a decision to deny a permit application may be had in state court by a writ of *common law certiorari*. This is not good enough, according to MacDonald: MacDonald argues that the *Freedman* "prompt judicial review" safeguard requires more than a possibility of judicial review--it requires the guarantee of a prompt decision on the merits.
>
> *The circuits are split on this issue.*

*MacDonald*, 243 F.3d at 1035 (emphasis added). See also, *e.g.*, *Thomas* v. *Chicago*, 227 F.3d 921, 926 (CA7 2000) (holding

that common law certiorari satisfies *FW/PBS*) (citing *Graff* v. *City of Chicago*, 9 F.3d 1309 (CA7 1993) (en banc), *cited in Thomas*, 122 S. Ct. at 781)); *Stratton* v. *Wenona Comm. Unit Sch. Dist.*, 551 N.E.2d 640, 646 (Ill. 1990) (explaining that writ is discretionary under Illinois law).

Respondents' related argument only reinforces that the conflict *is* squarely presented as to both "new" and "existing" entertainers and businesses: "Petitioner admits that the Metropolitan code does not 'guarantee that the appeal will be decided by a date certain'" (BIO 4 (quoting Pet. 2)) because "there is no time limit for a court to decide upon whether to grant the petition or not" (*id.* 5). Precisely: although the Ordinance grants applicants "prompt access" to judicial review by permitting them to file an immediate appeal (see §§ 6.54.040(E)(2), .070(D)(2), .110(M), .150(E)(6)), the Ordinance does not guarantee them a "prompt judicial decision."[3]

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[3] Respondents err in asserting, without any citation to Tennessee law, that a trial court has the "absolute discretion" to deny the writ. It has long been settled in Tennessee that common law certiorari will be granted if the applicant makes out a "prima facie" entitlement to the writ. *Rhea County* v. *White*, 43 S.W.2d 388, 397 (Tenn. 1931). And a trial judge's holding that an applicant is not entitled to a writ of certiorari is itself subject to appellate review. See, *e.g.*, *Armstrong* v. *Tennessee Dep't of Corr.*, No. M2000-02328-COA-R3-CV, 2001 Tenn. App. LEXIS 428 (App. June 7, 2001) (reviewing substance of First Amendment claim to determine whether trial court abused its discretion in denying common law writ); see also, *e.g.*, *Robinson* v. *Clement*, 65 S.W.3d 632 (Tenn. Ct. App. 2001); *Robinson* v. *Traughber*, 13 S.W.3d 361 (Tenn. Ct. App. 1999). Furthermore, respondents' own argument is self-defeating: if respondents are correct that the First Amendment is satisfied only by granting the writ of certiorari in appeals from adult-business licensing decisions, then state judges will be required to grant the writ by their duty to enforce the Federal Constitution. See U.S. Const., Art. VI; *Huffman* v. *Pursue*, 420 U.S. 592, 611 (1975); *Martin* v. *Hunter's Lessee*, 14 U.S. 304, 341-44 (1816) (Story, J.); cf. Pet. 10 n.8 (explaining that respondents' position relies on the unsupportable premise that state judges will fail to enforce the Constitution).

Indeed, this case is plainly an ideal vehicle to resolve the circuit conflict because the second question raised by the Petition (which relates to the additional procedural protections the Ordinance provides) presents this Court with the opportunity to address thoroughly the timing for judicial review required by the First Amendment. As the Petition explained (at 11) and respondents do not dispute, assuming this Court adopts the minority view that "prompt access" to judicial review does not satisfy the Constitution, question two allows the Court to address whether other measures short of guaranteeing a "prompt judicial decision" – such as a stay of adverse administrative rulings and the issuance of an interim license – are sufficient under the First Amendment. A definitive ruling on the constitutionality of these measures is essential because, as respondents must concede, a municipality is powerless to require a state court to issue a "prompt judicial decision."

3. Respondents' passing merits argument (at 16) is wrong for the reasons set forth in the briefs on the merits in support of the municipalities in *City News & Novelty* and *Thomas*, *supra*, which are easily summarized. The cases on which respondents rely all addressed measures that authorized administrators to prohibit speech based on its *content*. See *Southeastern Promotions* v. *Conrad*, 420 U.S. 546 (1975) (municipal review board authorized to deny permission to stage production based on production's content)[4]; *Blount* v. *Rizzi*, 400 U.S. 410 (1971) (Postmaster General authorized to seize materials he deemed obscene). By contrast, an adult-business licensing ordinance does not involve content-based determinations and thus "does not present the grave 'dangers of a censorship system.'" *FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215, 229 (1990) (plurality) (quoting *Freedman*, 390 U.S. at 58).

Moreover, the two prophylactic concerns underlying the requirement that censorship schemes guarantee a "prompt

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[4] Respondents' claim (at 11, 16) that the Tennessee common law writ of certiorari was at issue in *Southeastern Promotions* is just wrong. That case instead concerned a municipal censorship scheme that "did not provide a procedure" for judicial review. 420 U.S. at 561.

judicial decision" are absent in the context of adult-business licensing. Although courts have expertise in determining whether the content of speech is constitutionally protected (*Freedman*, 380 U.S. at 58), it is instead *municipalities* that have greater expertise in the workaday determination whether any particular business, including an adult business, is in compliance with a municipal code. And there is little or no risk that an adult business will engage in "self-censorship" (*id.*): "The license applicants * * * have much more at stake than did the motion picture distributor considered in *Freedman*, where only one film was censored. Because the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court." *FW/PBS*, 493 U.S. at 229-30 (plurality).

4. Nor is there any merit to respondents' remaining argument (at 6-11) that the scope of review on common law certiorari is insufficiently searching to satisfy the First Amendment. Preliminarily, that argument plainly presents no obstacle to review in this Court, given that the same standard applied under the ordinances at issue in both *City News & Novelty* and *Thomas*. See *Hanrahan* v. *Williams*, 673 N.E.2d 251, 273 (Ill. 1996) (Illinois common law certiorari cannot overturn factual determinations unless "against the manifest weight of the evidence"); *City News & Novelty* v. *Waukesha, WI*, 604 N.W.2d 870, 876 (Wis. App. 1999) (inquiry under Wisconsin certiorari procedure is whether municipal action was "arbitrary" and "the evidence was such that the board might reasonably make the order or determination in question"), *cert. dismissed as moot*, 531 U.S. 278 (2001). Furthermore, the scope of judicial review (as opposed to its timing) would be left for remand rather than decided by this Court in the first instance because that issue (i) is not included within the question presented, (ii) is not the subject of a circuit conflict that would merit review in this Court; (iii) was not decided by the majority below, and (iv) turns on a disputed question of state law – *viz.* the extent to which constitutional claims can be raised *via* the common law writ in Tennessee.

In any event, respondents are wrong to contend that the scope of review provided by Tennessee common law certiorari violates the First Amendment, a claim that no judge has accepted and that the district judge and the dissenting judge below both rejected in concluding that the Ordinance is constitutional. See Pet. App. 40a, 106a. Respondents correctly state (at 6) that common law certiorari in Tennessee, unlike statutory certiorari, does not permit the judge to hold a "trial *de novo*" to "reconsider and redetermine all the issues of fact, as well as law as if no such determination had been previously made" (*Hooser* v. *Warren County Bd. of Educ.*, 807 S.W.2d 230, 236 (Tenn. 1991)). Instead, any factual claims by the adult business turn on whether there was "material evidence to support the agency's findings." *Davison* v. *Carr*, 659 S.W.2d 361, 363 (Tenn. 1983), *quoted in Cooper* v. *Williamson County Bd. of Educ.*, 746 S.W.2d 176, 179 (Tenn. 1987). Contra BIO 10 (erroneously claiming, without citation, that administrative fact-finding is "*immune*" from review on common law certiorari (emphasis in original)). But, as respondents themselves explain (at 8), the factual claims that arise under the Ordinance "[i]mplicat[e] no constitutional or procedural issues whatsoever"; instead, the factual issues involve matters such as whether the applicant needs "to clean a number of couches, restroom walls, fixtures and shower stalls; repair a commode; and provide covered waste containers." See also *id.* at 9 ("repair a hand sink, clean some walls, air conditioning vents and storage areas"; "eliminate storage that may attract rodents and insects"; "clean the restroom floors, and provide covered trash cans").[5]

The First Amendment does not require, and common sense does not suggest, that a court should throw out the administrative fact-finding on those issues, which as noted falls squarely within the realm of municipal expertise. Although

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[5] Although respondents go beyond the record to state (at 7) that 15 applicants were initially denied licenses under the Ordinance, the more salient fact is the one they omit: that all 15 (including the six adult businesses at issue in this case) were granted licenses once they made needed repairs.

respondents hope to suggest that the administrative fact-finding might relate to the *content* of an adult business's speech – such as "violations of obscenity, indecent exposure and public nudity laws" (BIO 8 n.5) – those facts are determined in separate criminal or nuisance proceedings, *not* at the administrative licensing stage.[6] The "performance standards" to which respondents euphemistically refer (*id.*) concern not First Amendment expression, but instead sex acts, prohibiting (for example) an applicant to "*perform* or allow customers, employees or entertainers to *perform* sexual intercourse or oral or anal copulation or other contact stimulation of the genitalia on the premises" (emphasis added).

Nor are the types of claims that adult businesses can raise pursuant to Tennessee common law certiorari so limited as respondents hope to suggest. "The legislative and judicial history of this State manifests a strong purpose not to curtail the right to review by the writ of certiorari the exercise of judicial power by inferior or quasi-judicial tribunals." *Rhea County* v. *White*, 43 S.W.2d 375, 377 (Tenn. 1931). The matters reviewable under the writ manifestly include a "violation of constitutional or statutory provisions" (*Massey* v. *Shelby County*

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[6] See, *e.g.*, Ord. § .050(B)(5) ("No applicant shall have been found to have previously violated Section 17.36.260 of the metropolitan zoning code, applicable to sexually oriented/adult entertainment businesses, as evidenced by the judgment of a court within one year immediately preceding the date of the application."); *id.* § .080(A)(2) ("No applicant convicted of a crime of a sexual nature, as defined in Section 6.54.010, in any jurisdiction shall be eligible to receive a permit for the time period described below.").

Respondents also imagine scenarios that have never arisen, such as an individual who claims that he has been misidentified as a person with a prior conviction or an entity that disputes it is an adult business. These hypothetical examples, however, are not susceptible of a First Amendment facial overbreadth challenge like respondents' suit. See *City of Chicago* v. *Morales*, 527 U.S. 41, 52 (1999) ("[T]he overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612-15 (1973)).

*Retirement Bd.*, 813 S.W.2d 462, 464 (Tenn. Ct. App. 1991)) because the writ inquires whether the administrative decision maker acted "in violation of constitutional or statutory provisions or in excess of its own statutory authority; has followed unlawful procedure or been guilty of arbitrary or capricious action; or has acted without material evidence to support its decision" (*Watts* v. *Civil Service Bd.*, 606 S.W.2d 274, 277 (Tenn. 1980), *cert. denied*, 450 U.S. 983 (1981)). For example, in *Watts*, the Tennessee Supreme Court evaluated whether a Civil Service Board's ruling against a police officer violated the First Amendment under *Pickering* v. *Board of Education*, 391 U.S. 563 (1968).

## CONCLUSION

For the foregoing reasons, as well as those stated in the Petition for a Writ of Certiorari, certiorari should be granted.

Respectfully submitted.

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April 24, 2002

SENATE BILL NO. 2418

By Haynes

Substituted for: House Bill No. 2778

By Odom

AN ACT To amend Tennessee Code Annotated, Title 27, Chapter 9, relative to the review of a decision of a board or commission that has revoked, suspended or denied a license or permit that is required prior to engaging in conduct protected by the First Amendment to the United States Constitution.

WHEREAS, The United States Court of Appeals for the Sixth Circuit held that Tennessee Code Annotated, Section 27-9-111(e), allows state courts discretion as to whether or not to issue a writ of certiorari and hear an appeal from a decision by a board or commission revoking, suspending or denying a license or permit required prior to engaging in conduct protected by the First Amendment to the Constitution of the United States; and

WHEREAS, The United States Court of Appeals for the Sixth Circuit further held that since the grant of the writ of certiorari remains discretionary in such cases, that Tennessee Code Annotated, Section 27-9-111(e), does not guarantee the petitioner prompt judicial review of the board's or commission's decision, as is required by the First Amendment to the Constitution of the United States; now therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 27-9-111, is amended by deleting the first sentence of subsection (e) and substituting instead the following:

> If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution of the United States, and either the petitioner or the respondent requests an expedited hearing, the court shall immediately grant the writ of certiorari, and shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari.

SECTION 2. This act shall not take effect until such time as the United States Supreme Court has denied the petition for a writ of certiorari filed by the Metropolitan Government of Nashville and Davidson County in the case of Déjà vu, Inc. v. Metropolitan Government, 274 F.3d 377 (6th Cir. 2001), or if the United States Supreme Court grants a writ of certiorari, this act shall not take effect until such time as the United States Supreme Court affirms the Sixth Circuit's opinion on the issue of "prompt judicial review." If the United States Supreme Court reverses the Sixth Circuit's opinion on "prompt judicial review" this act shall never take effect.